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DEPUTY

Supreme Court of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
v.
Michael ALLEN and Cleamon Johnson,
Defendants and Appellants.
No. S066939.
November 30, 2006.

Los Angeles County Superior Court No. BA105846-01, 02
Automatic Appeal from the Judgment of the
Superior Court of Los Angeles County
Honorable Charles E. Horan , Judge

Appellant's Reply Brief

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DEATH PENALTY

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II. **The prosecutor's misconduct in this case in knowingly and affirmatively presenting false testimony to win a conviction and sentence of death violated Appellant's due process right to fundamental fairness. Because the misconduct was so flagrant and extreme, Appellant's conviction should be reversed and the case dismissed with prejudice because this remedy is the only effective way to deter this type of government misconduct in the future, and thereby maintain public confidence in California's criminal justice system.** 5

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CLAIMS OF ERROR REGARDING WITNESS CARL CONNOR [ISSUES #1-3]

ISSUE #1

The Prosecutor Committed Prosecutorial Misconduct That Was Material And Prejudicial When She Knowingly Presented The False Testimony Of Carl Connor. As Such, It Violated Appellant's Constitutional Rights to Due Process Right To A Fair Trial And to Fundamental Fairness, And It Mandates That Appellant's Convictions And Judgment Of Death Be Reversed.

Summary of Attorney General's Response (Respondent's Brief, 156-169[1]) to Appellant's Argument #1 (Appellant's Opening Brief, 64-122[2]):

Respondent argues that the defense at trial did not object to Connor's testimony based on the grounds that it was false. Accordingly, this claim was waived. (RB, 167) Respondent further argues that Appellant's assertion that an objection or admonition would have been futile lacks merit, because an order striking Connor's testimony would have been effective to cure any harm. (RB, 167)

Respondent also argues that Appellant's claim is substantively meritless because there was no prosecutorial misconduct; that the prosecutor did not withhold material information regarding Connor's credibility. (RB, 167) Additionally, even if Conner's testimony differed from other witnesses, it does not necessarily follow that his testimony was false. (RB, 167)

Finally, and in any event, any error was harmless. (RB, 163-164)

Appellant's Rebuttal Argument to Attorney General's Response to Issue #1:

[1] Hereafter, [RB, 156-169]
[2] Hereafter, [AOB, 64-122]

To be very clear, Appellant's position is that the prosecution should never have presented Carl Connor's alleged eye witness testimony to the jury. Why? Because any reasonable prosecutor would have known, or with any careful evaluation of the facts should have known, that Carl Connor's entire testimony was a lie. He was not present at the murder scene, nor was he an eye-witness to those murders. His original statement to the police was as "inherently unbelievable" as was his subsequent version for the grand jury, as was his further revised version at trial. Each adaptation of Connor's alleged eye-witness account of the Loggins/Beroit murders was directly contradicted by key significant and uncontested facts of the case. (AOB, 64-65) Since Connor was 100% wrong as to the most significant and uncontested factual details of the murders, Respondent's suggestion that Connor was simply mistaken as to a few details is *not* a reasonable conclusion.[3]

Case law makes it clear that in certain circumstances the prosecution has an *affirmative* duty to ensure that false testimony is not presented to a jury. An example of this is "where previously undisclosed evidence revealed that the prosecution introduced trial testimony that it knew *or should have known* was perjured; ...." (*Kyles v. Whitley* (1995) 514 U.S. 419, 433 [131 L.Ed.2d 490], citing *U.S. v. Agurs* (1976) 427 U.S. 97, 103, [49 L.Ed.2d 342]; *italics added.* [See also, *Mooney v. Holohan*, 24 U.S. 103, [79 L.Ed 791].) The above italicized language reflects the court's expectation that the prosecution has an affirmative duty, in certain circumstances, to sufficiently investigate the truthfulness of the testimony it

[3] During rebuttal argument, the prosecutor told the jury: "And in any event, even if [Conner was wrong about some facts] . . . does that change the accuracy of his identification? He knows Mr. Allen . . . He's never identified anybody else . . .." [RT, 5226-5227]

presents. This is particularly true when the prosecution has some type of notice that the witness' testimony may not be truthful.

A prosecutor should not be excused from presenting false testimony simply because she was not expressly informed of its falsity. She has an affirmative duty to investigate when she has sufficient notice of a witness' potentially false testimony. (See (*Kyles v. Whitley* (1995) 514 U.S. 419, 438 [131 L.Ed.2d 490] [The scope of this disclosure obligation extends beyond the contents of the prosecutor's case file and encompasses the duty to ascertain as well as divulge "any favorable evidence known to the others acting on the government's behalf ...."]; *U.S. v. Payne* (2d Cir. 1995) 63 F.3d 1200, 1208 ["The individual prosecutor is presumed to have knowledge of all information gathered in connection with the government's investigation."]; *Smith v. Secretary Dept. of Corrections* (10th Cir. 1995) 50 F.3d 801, 824 ["the prosecution" extends to law enforcement personnel and other arms of the state involved in investigative aspects); *U.S. v. Brooks* (D.C. Cir. 1992) 966 F.2d 1500, 1503 [duty to investigate based on "close working relationship' " between police and United States Attorney); *U.S. v.Osorio* (1st Cir. 1991) 929 F.2d 753, 761 ["The prosecutor charged with discovery obligations cannot avoid finding out what 'the government' knows, simply by declining to make reasonable inquiry of those in a position to have relevant knowledge."]; *Carey v. Duckworth* (7th Cir. 1984) 738 F.2d 875, 878 ["[A] prosecutor's office cannot get around *Brady* by keeping itself in ignorance, or compartmentalizing information about different aspects of a case."].) "....[N]o one doubts that police investigators sometimes fail to inform a prosecutor of all they know. But neither is there any serious doubt that 'procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it.'" (*Kyles v.*

Whitley (1995) 514 U.S. 419, 438 [131 L.Ed.2d 490], quoting *Giglio v. U.S.* (1972) 405 U.S. 150, 154, [31 L.Ed.2d 104].)

Respondent attempts in a footnote [RB, 167, fn.116] to dismiss the relevance of *People v. Kasim* (1997) 56 Cal.App.4th 1360, cited extensively by Appellant Allen in his opening brief. [AOB, 96-97] Respondent omits any discussion regarding the reason why Appellant cited *Kasim* so extensively. In *Kasim*, the prosecutor "did not know about the full extent of benefits [the] witnesses had obtained ... because he adhered to an approach unlikely to uncover this information." The *Kasim* court rejected the prosecution's position, expressly stating that

> ... a prosecutor cannot adopt a practice of "see no evil or hear no evil." Under these circumstances the prosecution has an affirmative duty and cannot – by looking the other way – shirk its constitutional obligation to prevent prosecution witnesses from deceiving the jury. If the prosecution knows or should know that testimony was false, the prosecution cannot allow the false testimony of its witnesses to stand uncorrected."

Not only did Respondent fail to appropriately address *People v. Kasim*, Respondent failed to address the very argument raised by Appellant in this Issue #1; i.e., that the prosecution had an affirmative duty to investigate whether Carl Connor's "eye-witness" testimony was truthful.[4]

Respondent's Wavier Argument [RB, 167]:

Respondent argues extensively that Appellant has waived this issue by failing to object at trial. [RB, 156, 167] Yet Respondent offers no response to Appellant's argument that the absence of a defense objection did not waive the issue on appeal.[5] Appellant respectfully refers the Court to that argument in his Opening Brief. [AOB, 73-77]

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[4] Or which of Connors' various "eye-witness" versions, if any, was truthful.

[5] Respondent simply chose to ignore Appellants' argument, citing only to cases which are inapplicable: In *Musselwhite*, the allegation appeared as an

Appellant asserts that when the prosecution presents false testimony, the existence of an adequate objection or lack thereof, is not dispositive. It is a violation of Appellant's Due Process rights if the prosecution presents false testimony to obtain a conviction. (*Napue v. Imbler* (1959) 360 U.S. 264; see also *U.S. v. Agurs* (1976) 427 U.S. 97, 103 [A "conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." (*footnote omitted*)].)

Respondent's Implied "Harmless Error" Argument [RB, 167-169]:

Respondent argues that the defense was able to present sufficient evidence that could have impeached Connor, and that "[a]n order striking Connor's testimony, had that been appropriate, surely would have been sufficient." [RB, 167]

Appellant asserts that Respondent's position is rather astounding. Carl Connor's testimony, if believed by the jury, would have been absolutely devastating to Appellant. To suggest that any juror, after hearing his testimony, could have simply disregarded it if instructed to do so by the trial court, is patently unbelievable.

Conclusion:

For the reasons state above, in addition to the argument presented in the Appellant's Opening Brief, Appellant respectfully urges this Court overturn his conviction and judgment of death.

"after-the-fact-last-ditch-effort" to change the outcome when the jury believed the prosecution experts' opinion about the reliability of a brain-electrical-activity-mapping (B.E.A.M.) machine test. *People v. Musselwhite* (year) cite … Similarly in *Marshall,* the allegation was raised *only* when the witness' potential benefit to the defense proved unsuccessful, and only *after* the verdict against defendant. (*People v. Marshall* (1996) 13 Cal.4th 799.)

ISSUE #2

The Prosecutor's Misconduct in Knowingly and Affirmatively Presenting False Testimony to Win a Conviction and Sentence of Death Was Outrageous Government Conduct that Shocks the Conscience of the Court. As Such, Appellant's Conviction Should Be Reversed and the Case Dismissed *with Prejudice* Because This Is the Only Effective Way to Deter This Type of Government Conduct in the Future.

Summary of Attorney General's Response [ROB, 169, fn. 118] to Appellant's Argument #2 [AOB, 122-137]:

Respondent does not address this issue raised by Appellant, insisting that no prosecutorial misconduct occurred when Carl Connor's testimony was presented to the jury. [ROB, 169, fn. 118]

Appellant's Rebuttal Argument to Attorney General's Response to Issue #2:

Appellant respectfully asserts that upon close examination of Connor's various pretrial statements, as well as his testimony before the grand jury and at trial, the conclusion is unavoidable that Connor was *not* an eye witness to the murders. Since this should have been readily apparent to any reasonably prudent prosecutor, the decision to "turn a blind eye" to this conclusion should be construed as misconduct that is flagrant and extreme. Accordingly, Appellant's conviction should be reversed *with prejudice* because

1. The misconduct "shocks the conscience of the court";
2. The California Constitution's Double Jeopardy Clause requires this remedy; and
3. This remedy is the only effective way to deter this type of government misconduct in the future, and thereby maintain the public's confidence in California's criminal justice system. [See AOB, 122-137]

Issue #3

The Trial Court Erred When It Allowed the Prosecution to Introduce Irrelevant Evidence and Inadmissible Opinion Evidence that Improperly "Bolstered" the Credibility of Witness Carl Connor. The Errors Were Prejudicial, and Require Reversal of Appellant's Conviction.

Summary of Attorney General's Response [RB, 170-174] to Appellant's Argument #3 [AOB, 138-174]:

Respondent briefly discusses the three (3) examples raised by Appellant in the AOB that the prosecution was improperly allowed to bolster the credibility of Carl Connor through the testimony of Detective Sanchez. Respondent briefly asserts that any error was waived because of a lack of an appropriate specific objection in each instance, followed by the "time honored" adage that even if it was error on each occasion, each error was "harmless." [RB, 170-174] Respondent does not address the cumulative effect of these errors, or whether the cumulative effect of the errors was prejudicial.

Appellant's Rebuttal Argument to the Attorney General's Response to Issue #3:

As stated in considerable detail in Appellant's Opening Brief, Carl Connor's credibility was at the very heart of this case. He was the only eye witness who claimed that Appellant was the shooter. Because of the importance of attacking the credibility of this key prosecution witness, the defense introduced extensive evidence, both on cross-examination and during the defense case, that properly and legally impeached his credibility. [AOB, 22-23, 77-93, 137-150] There was a very good chance that the jury would have rejected Connor's testimony in its entirety ... until the court allowed the prosecution, over proper defense objections, to improperly bolster Connor's credibility through the inadmissible testimony of a veteran, respected police investigator. The impact of this inadmissible

rehabilitation evidence, coming from a highly credible witness, cannot be underestimated.

1. Detective Sanchez' testimony that other information she received through other sources during this murder investigation corroborated the testimony of Connor.

Respondent seeks to minimize the nature and impact of Det. Sanchez' testimony. In effect, however, the impact of her testimony on Connor's credibility would have been huge. The only relevance of the question and answer, indeed the very reason the prosecutor asked the question, was to bolster the beleaguered Connor's credibility. In substance, Det. Sanchez was impermissibly allowed to testify that, based upon her years of experience as a police officer, it was her opinion that Carl Connor testified truthfully. Her testimony was based on the fact that the details of Connor's testimony were consistent with information she had received from various *unidentified* sources, none of which was identified or admitted into evidence. The *only* reasonable and normal inference to be drawn by the jury was that since Connor's testimony was consistent with additional "unknown" information she allegedly received from other anonymous sources, Connor's testimony had to have been truthful. It would have been too great a coincidence if Connor had fabricated his testimony and it "just happened" to be consistent with the other information the detective had received.

Further, Respondent states that Det. Sanchez did not render an opinion that Connor "witnessed the shooting." [RB, 171] This response is somewhat incredulous. The *only* relevant inference to be drawn from the prosecutor's question and the detective's response was that Connor was truthful when he claimed he was an eye witness to the shootings! If he had not been an eye witness, his testimony would have been inconsistent with

other information received by the detective; hence, he was truthful, the detective implied, when he testified that he saw the shootings.

The defense properly objected to this testimony, it was inadmissible, and the prejudice, in connection with other errors, was prejudicial.

2. Detective Sanchez's opinion testimony that Connor was still fearful of retaliation when he testified.

Det. Sanchez was impermissibly allowed to testify that, in her opinion as an experienced and respected police officer, Carl Connor was still fearful of retaliation and was still concerned for his safety at the time he testified. The inadmissible inference from this testimony was that Connor was undoubtedly truthful when he testified because he would have had no reason to testify falsely knowing his testimony would jeopardize his life.

Respondent attempts to dismiss this issue by claiming it was admissible lay opinion. [RB, 172-173]

Appellant respectfully refers the Court to his argument in his Opening Brief wherein he discusses the admissibility of this opinion, referring specifically to the language of this Court in *People v. Melton* (1988) 44 Cal.3d 713, as well as other appellate court decisions. [AOB, 157-160]

The defense properly objected to this testimony, it was inadmissible, and the prejudice, in connection with other errors, was prejudicial.

3. Detective Sanchez' testimony regarding Connor's testimony and receipt of a large reward in the Reco Wilson case.

Det. Sanchez was impermissibly allowed to testify that Carl Connor received a $25,000 reward for his testimony in the Reco Wilson murder trial that *resulted in a conviction* -- the inadmissible inference being that since the jury in the Reco Wilson case convicted him based on Connor's testimony at that trial, it is reasonable to assume he also provided truthful

testimony in Appellant's trial. That is, why would Connor testify truthfully in one murder trial, and then testify untruthfully in a subsequent trial?

Respondent dismisses this argument by simply stating that a "reasonable juror would not have drawn such inferences." [RB, 174] However, those inferences were the very reason why the prosecutor elicited this testimony from Det. Sanchez. Otherwise, the questions and answers would not have been relevant.[6]

The defense properly objected to this testimony, it was inadmissible, and the prejudice, in connection with other errors, was prejudicial.

Conclusion:

As to each of these issues, Respondent concludes by stating "[t]here is no reasonable probability that appellants would have obtained a more favorable result in the absence of the complained of testimony." [RB, 174] Anticipating this response, Appellant explained in considerable detail in his Opening Brief (AOB, 165-174) why these erroneous rulings by the trial court were not harmless, particularly when considered in conjunction with the numerous other erroneous rulings made by the trial court.

CLAIMS OF ERROR REGARDING WITNESS FREDDIE JELKS [Issues #4-9]

ISSUE #4

The Trial Court Abuses Its Discretion When It Refused To Allow Appellant To Confront, Cross-Examine And Impeach Freddie Jelks Regarding Details Of His Initial Interrogation By The Police, As Well As His Pending Murder Case. The Trial Court's Error Denied Appellant His Fifth, Sixth And Fourteenth Amendment Rights To Confront And Cross-Examine His Accusers, As Well As To Present A

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[6] Indeed, the objection interposed by defense counsel, and overruled by the court, was lack of relevance. [RT, 18:3991-3992; AOB, 161]

Defense. The Errors Were Prejudicial, And They Require Reversal Of Appellant's Convictions And Sentence Of Death.

Summary of Attorney General's Response [RB, 178-194] to Appellant's Argument #4 [AOB, 174-228]:

Respondent argues that the trial court did not abuse its discretion when it limited the defense' ability to confront and cross-examine Jelks. [RB, 190-194] Respondent claims the trial court said the defense could cross-examine Jelks regarding the nature of Jelks' case. However, because the court would also allow into evidence the additional highly prejudicial evidence of co-defendant Johnson's involvement in other murders, the defense chose not to delve into the details of Jelks' interrogation with the police. [RB, 191] Respondent further argues that Appellant Allen voluntarily "abandoned" going into the details of Jelks' interrogation with the police. [RB, 192]

Finally, Respondent adds that any error was harmless because the prohibited cross-examination would not have produced a "significantly different impression" of Jelks' credibility because the defense was allowed to adequately impeach Jelks. [RB, 193]

Appellant's Rebuttal Argument to Attorney General's Response to Issue #4:

Appellant Allen was *never* given a choice as to the scope of his cross-examination of Jelks, nor did Appellant Allen ever voluntarily abandon cross examination of Jelks regarding his pending murder case and the surrounding police interrogation, as Respondent argues.

Appellant Allen does *not* suggest that Respondent seeks to intentionally mislead or confuse the Court in its response to this issue. However, by clumping Appellant Allen and co-defendant Johnson together

as "the defense", an *erroneous* impression of the court's ruling is created by Respondent in terms of how the ruling pertained to Appellant Allen.

1. The court's discussion concerning undue prejudice pertained *only* to co-defendant Johnson; there was *no* prejudice to Appellant.

The trial court's discussion regarding limiting the scope of cross examination of Jelks was directed *exclusively* to counsel for co-defendant Johnson and to the potential prejudice to co-defendant Johnson if the jury were to learn he was a co-defendant in Jelks' pending murder case. [See AOB, 187-189; RT, 16:3584-3617] The court failed to consider Appellant's right to confront and cross-examine Jelks as part of the court's ruling. This is patently obvious because there was *no* potential prejudice to Appellant if the details of Jelks' pending murder case (and the interrogation surrounding it) were exposed to the jury. *None*. The court thus presented *co-defendant Johnson* with a "Hobson's choice"[7]: If co-defendant Johnson sought to confront and cross-examine Jelks regarding the details of his pending murder case, the court would allow the jury to learn the highly prejudicial fact, that co-defendant Johnson was also accused of murder in that case. [RT 16:3584-3617] Obviously, counsel for co-defendant Johnson did not want to risk inquiring into Jelks' pending murder case based on this comment and ruling by the court.

And the inescapable *implied* ruling to Appellant Allen's counsel was that he could *not* explore the details of Jelks' pending murder case because it would be too prejudicial to co-defendant Johnson. Clearly, the court was not about to permit introduction of such highly prejudicial evidence that would necessitate either a mid-trial severance of co-defendant Johnson or probable reversal on a post-conviction appeal.

[7] A "Hobson's choice" is a synonym for "choicelessness". *Roget's International Thesaurus*, Fourth Edition, 1006.

That this ruling extended to Appellant Allen was immediately apparent. After giving co-defendant Johnson the "Hobson's choice" discussed above, the court told counsel for Appellant Allen:

> Crt: No. We are not going to talk about the fact it's [Jelks' pending case] a murder case. [RT, 16:3611]

Shortly thereafter, Appellant Allen's counsel sought to question Jelks on cross examination about his participation in other gang related murders generally.

> Orr: Did you ever participate into, seeking out enemies of the Bloods and destroying them?
> DDA: Objection.
> RL[8]: Your Honor, could we approach the bench, your Honor?
> Crt: Yes, come on u
> [At side bar]
> Yes. Maybe you ought to address your objection, Mr. Orr. [sic.]
> RL: I object.
> Orr: I know what he's talking about. Forget about it.
> Crt: You want to withdraw the question?
> Orr: Forget about it. [RT, 1644-3645]

Because the court previously held that counsel for Appellant Allen could not confront Jelks about the details of his pending murder case [RT, 16:3611], it is apparent from Mr. Orr's answer to the court's query regarding withdrawal of the question that Mr. Orr was simply complying with the court's previous ruling: Appellant Allen would not be allowed to question Jelks about the details of his pending murder case, since that would be considered an obvious example of Jelks' "seeking out enemies of Bloods and destroying them."

2. <u>The court *expressly* ruled that Appellant's right to confront and cross-examine Jelks was limited</u>.

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[8] "RL" refers to Richard Lasting, trial counsel for co-defendant Johnson.

Co-defendant Johnson's counsel expressed concern that on cross-examination, Jelks might volunteer information that the court previously had prohibited. The court's response illustrates the fact that the court had, indeed, made an express order limiting the scope of cross-examination of Jelks:

> Lst: Your honor, if we follow the court's guidelines or order here, in terms of –
>
> Crt: You are going to then ask me what *further order* I'll make later? [RT, 16:3612. Emphasis added.]

In order to prevent Jelks from volunteering inadmissible information on cross-examination, the court stated Jelks would be told "you are going to be asked not about the facts of your pending case; you don't have to worry about the Fifth Amendment and having Mr. Forbes here."[9]

Prior to Jelks' testifying in front of the jury, the court itself told Jelks directly of its ruling regarding the limitation on cross-examination of Jelks:

> Crt: We are not going to talk about – *under no circumstances* are we going to talk about the fact you've got a pending murder case. We are going to ask you, however, counsel will, if you have a case pending wherein you might do life, a life to And that's your understanding, is it not?
>
> Jlks: Yes. [RT, 16:3620-3621. Emphasis added.]

<u>3. Appellant did, in fact, object to the court's ruling limiting cross-examination of Jelks.</u>

[9] Mr. Forbes was the attorney representing Jelks in his pending murder case, and was available to advise Jelks of his constitutional right not to incriminate himself when he testified as a witness in this case. [RT, 16:3496; AOB, 186] By virtue of the court's ruling, Mr. Forbes' presence was not required because neither defense attorney was permitted to question Jelks about the details of his pending case.

Furthermore, contrary to Respondent's claim that Appellant waived this issue by voluntarily "abandoning" this line of questions, Appellant's counsel did vigorously object to the court's ruling.

> Orr: ...And also, when I have a chance, I want to speak to the court's tentative ruling [regarding the scope of cross-examination of Jelks].
> Crt: I'll hear you right now.
> Orr: I think it's an outrageous decision by the court. [RT, 16:3601-3602]

Complying with the court's evidentiary ruling should never be construed as a voluntary "abandonment" of this line of questions as Respondent suggests.

4. <u>The court's ruling limiting Appellant's right to confront and cross-examine Jelks impacted Appellant's right to cross-examine other witnesses.</u>

Subsequently, the court reiterated and expanded its ruling to prohibit cross-examination of *any* witness regarding the pending murder involving Jelks and co-defendant Johnson. On cross-examination of Marcellus James, counsel for Appellant Allen sought to question James regarding whether he spoke to the police about the Mosley murder [i.e., the pending murder involving Jelks and co-defendant Johnson]. The reporter's transcript of that discussion follows:

> CRT: I've got it [i.e., James' 1994 pre-plea report].
> RL: It shows an arrest of 2-27-92.
> CRT: Yes.
> RL: <u>That's the first day he [James] talked to the police</u>.
> ORR: <u>Right</u>.
> RL: Because there's a transcript of an interview at a later date that makes reference to a previous police interview on this date.
> CRT: On what date?
> RL: On 2-27-92. I can show you if you want to see the page.
> DDA: <u>The subject matter of that interview, though, was the Mosley murder, the drive-by</u>, which is why we [the

prosecutor and James] didn't go into it [on direct examination]. And I have admonished the witness [James] that he can't talk about it, but he was a witness on that case [the Mosley murder].

CRT: I think we ought to stay away from that for that reason. We are liable to get right back into a situation –

RL: That's why I wanted to bring it u

ORR: I wasn't going to go into that [i.e., the details of the Mosley murder].

[RT, 18:4051-4052 (Emphasis added)]

The trial court was apparently concerned that James might testify about co-defendant Johnson's involvement with Jelks in the Mosley murder, or that James' testimony might "open the door" to evidence of other crimes involving co-defendant Johnson. Mr. Orr reassured the court that he did not intend to go into the details of the Mosley murder. Mr. Orr specifically wanted to ask James if the gang investigators on February 27, 1992 tried to "squeeze" James into providing information concerning the Loggins/Beroit murders, not just the Mosley murder. The court responded as follows:

CRT: I'll let you [Mr. Orr] do this: You can ask him [James] if it's not a fact that he was in custody at that time on an allegation of – I don't think spousal abuse is the right word; I don't think they were married – but domestic abuse.

ORR: Are you talking about 2-27[-1992]?

CRT: No, no.

. . .

DDA: No, he's talking about the date in 1994.

CRT: We are not going to talk about the first – [i.e., the first interview with James on 2-27-1992]

ORR: They [the police] wanted information on this case [Loggins/Beroit] then [on 2-27-1992].

CRT: If you want to get into a situation wherein we're talking about another drive-by shooting, that's what we're getting at.

ORR: I'm going to say "this case here you gave information." That's what I'm going to say.

CRT: What I'm going to let you do is elicit from him [James] that in 1994 the interview wherein he tells the police that your client confessed to this homicide, that

> at that point in time he, the witness [James] was in custody on an allegation that he had abused the female that he lives with, or who is the mother of the kids. Yes, you may do so.
> [RT, 4052-4053 (Emphasis added)]

As thus evidenced, it is clear that the court ruled, over Appellant's objection, that the scope of cross-examination of Jelks would be limited. Appellant asserts he was *not* given a choice by the court regarding the extent to which he could cross examine Jelks. That "choice" was extended only to co-defendant Johnson. Appellant Allen also did not voluntarily "abandon" his right to confront Jelks regarding the details of his pending murder case and the surrounding interrogation.

5. The error was *not* "harmless":

Freddie Jelks was one of three *critical* witnesses for the prosecution. [AOB, 25-31] As such, it was *critical* for the defense to vigorously contest his credibility. [AOB, 174-187] That being the case, *any* restraint limiting the confrontation and cross-examination of Jelks unnecessarily and unfairly encumbered Defendant's ability to defend himself. At trial, Defendant was not allowed to confront Jelks and establish the following, any one of which may have been sufficient to cause the jury to reject Jelks' testimony in its entirety:

1. Numerous statements made by Jelks to the police during his interrogation that were inconsistent with his testimony and would have dramatically contradicted much of Jelks' testimony on direct examination. (See AOB, 204-214, 248)

2. Jelks' willingness to lie while under oath, an "evil" he was "ready" to commit because of the character trait he possessed for moral turpitude. His admission to committing murder during the interrogation was evidence of his character trait involving moral turpitude, or a readiness to do evil. (See AOB, 214-217, 248)

3. His strikingly probative evidence of a motive to ingratiate himself with the prosecution when he testified. (See AOB, 217-223, 248)

4. Jelks' testimony was false, involuntary, and the product of continuing police coercion that began during his interrogation and extended throughout his trial testimony. (See AOB, 204; See also AOB, Issue 6, 248-293 for a full discussion of this claim.)

Certainly Jelks credibility was impeached ... but only to a limited extent determined by the trial court. Because of the court's limitation on cross-examination of Jelks, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently altruistic witness. (AOB, 218-220; see also *Davis v. Alaska* (1974) 415 U.S. 308, 320, 94 S.Ct. 1105, [39 L.Ed.2d 347], ["The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness"].)

The prosecution *chose* to try Appellant and co-defendant Johnson jointly. The prosecution *chose* to call Freddie Jelks to testify against Appellant and co-defendant Johnson. The prosecution *chose* to limit cross-examination of Jelks so as to avoid unduly prejudicing co-defendant Johnson, and the prosecution *chose* to object to Appellant's Motion to Sever

In these circumstances, the trial court could have granted Appellant's Motion to Sever. This would have protected co-defendant Johnson from exposure to such highly inflammatory and prejudicial evidence and, at the same time, allowed Appellant to adequately confront and cross-examine his primary accuser. The trial court could *also* have accomplished the same goals by simply having Jelks omit any reference to

the name(s) of his co-killers, as counsel for co-defendant Johnson urged [RT, 16:3604, 3607]

In effect, however, the trial court's ruling sacrificed Appellant's right to confront and cross-examine his primary accuser in order to protect the State's interest in judicial economy.

The prejudice to Appellant was compounded, moreover, when the prosecution introduced evidence that *no promises* had been made to Jelks in exchange for his testimony. (See AOB, 196-204, 326-327)

Conclusion:

Had the jury been aware of the extent and seriousness of the unknown facts of Jelks' pending case, in conjunction with improper police conduct and evasive, self-serving fabrications by Jelks during his interrogation, the full weight of Jelks' lack of credibility would have been revealed to the jury and would have significantly altered the outcome of the trial. The trial court's ruling was an abuse of discretion and the error created thereby was not harmless.

ISSUE #5

The Prosecutor Committed Prosecutorial Misconduct When She Failed to Disclose Material Evidence to the Court Upon the Court's Specific Request. The Prosecutor thereafter Failed to Correct the Court's Misunderstanding of the Facts on Five Occasions. This Misconduct Was Material, Violated Appellant's Fourteenth Amendment Right to Due Process and a Fair Trial, and Was Prejudicial, thereby Requiring Appellant's Conviction and Judgment of Death Be Overturned.

Summary of Attorney General's Response [RB, 226-228] to Appellant's Argument #5 [AOB, 229-247]:

The Attorney General argues that the prosecutor did not fail to disclose to the trial court material evidence regarding Freddie Jelks; that the

claim is meritless because Appellant Allen misstates the record. [RB, 226] The Attorney General states:

- In 1992, James told the police that Jelks was the driver of the vehicle.
- In 1995, James told the Grand Jury that Jelks was the driver of the vehicle.
- In 1997, during the penalty phase of Appellant Allen's trial, James testified that Jelks was the driver; that he'd been mistaken when he said that Jelks was, inferentially, one of the shooters.
- Only in 1994, did James tell the cops that Jelks was, inferentially, one of the *shooters*.

Therefore, even if the prosecutor had told the trial court about James statement that Jelks was one of the shooters instead of the driver, this revelation would not have caused the court to rule differently regarding the scope of cross examination of Jelks. Further, the defense could have brought this discrepancy to the court's attention when the prosecution did not. After all, the prosecution produced James' statements in discovery. Hence, there was no prosecutorial misconduct.

Appellant's Rebuttal Argument to the Attorney General's Response to Issue #5:

Appellant *did not* misstate the record in terms of *when* James said *what* and to *whom*. (RB, 227) Respondent contorts the record to make it seem so.

James' two (2) tape recorded statements in 1994: Respondent seeks to undermine Appellant's argument by minimizing James' 1994 contacts with the police. In fact, James *twice* spoke to the police in 1994. On *both* occasions James' statements were tape-recorded and on *both* occasions James identified Jelks as one of the *shooters* in the Mosley murder. It is central to Appellant's claim that *at the time* the court asked the prosecutor for any additional information regarding Jelks' connection to the Mosley murder, the prosecutor had in her possession a) two tape-recorded

statements in which James implicated Jelks as one of *shooters* in the Mosley murder, and b) James contradictory statement to the Grand Jury in 1995 that Jelks was the driver in the Mosley murder. Since the court was aware that Jelks had given to the police four (4) self serving and untruthful versions of his involvement in the Mosley murder, the fact that James had *twice* told the *very same* officers investigating Appellant Allen's case that Jelks was one of the shooters (and not merely the driver, as Jelks' claimed in his 4th version to these same detectives) would have had a significant impact on the trial court's decision in limiting the scope of cross examination of Jelks.

James' 1992 statements to the police: Respondent claims that in 1992 James told the police that Jelks was the driver of the car used in the Moseley murder. For support, Respondent mistakenly cites the *penalty phase* testimony of Marcellus James that was introduced solely against co-defendant Johnson. [RB, 227; RT, 6210-6211, 6216-6217, 6223] Therein, James testified that he first spoke to the police about the Mosley murder in 1992 [RT, 6210], but his testimony regarding whether Jelks was one of the shooters or the driver pertained to his September 21, 1994 interview with the police [RT, 6214, 6216]. James *never* testified *at any time* that he told the police *in 1992* that Jelks was the driver of the car.

Detective Williams testified against co-defendant Johnson *in the penalty phase* of the trial. He related that he interviewed Marcellus James in 1992. In response to an improper leading question by the prosecutor, he agreed with her that James told him that he had observed Jelks as the driver of the car used in the Mosley murder. [RT, 6241] On cross-examination, the confusion increased, however, when he refreshed his recollection from a document, then stated that his initial interview with James was not February 1992, but September 27, 1992! [RT, 6246] Further, it is apparent upon reading the transcript of his testimony that his memory of the

interview with James, whenever it was, was very hazy at best. [See his responses in which he couched most of his answers with "I believe …." and "I recall …." [RT, 6241-6247]

Respondent's conspicuous bootstrapping of *penalty phase* evidence fails to buttress the prosecution's position. At the time the trial court inquired of the prosecutor regarding Jelks' involvement in the Mosley murder, the prosecutor *knew* that James had twice, in separate tape-recorded statements to the police, implicated Jelks as one of the shooters. She also was aware that James had contradicted himself to the Grand Jury in 1995 when he testified that Jelks was the driver. Respondent's attempt to include penalty phase testimony in no way supports Respondent's conclusion that James' two tape recorded statements to the police in 1994 would not have cast doubt on Jelks' credibility.

Respondent cannot dodge accountability by concluding that Appellant Allen should have brought the evidence to the court's attention. The issue here is the *prosecutor's duty* to disclose this information, the *prosecutor's duty* to correct the court's misunderstanding of this evidence, and the *prosecutor's failure* to do either. Respondent fails to present any justification for the prosecutor's unilateral decision to refuse to disclose the information to the court that, she knew, would cause the trial judge to further question the credibility of Jelks. And, if the trial judge had further questions regarding Jelks' credibility, he would *not* have limited the scope of cross-examination of Jelks.

Conclusion:

In ruling on the prosecution's motion to limit the scope of cross-examination of Freddie Jelks, the court specifically asked the prosecutor if she was aware of any additional information that linked Jelks to the Mosley murder other than Jelks' admissions to the detectives. The prosecutor failed to disclose additional information she had in her possession that

directly contradicted Jelks' statements to the police and incriminated Jelks even more in the Mosley murder.

The prosecutor's subsequent argument further misled the court. On five (5) subsequent occasions -- when the court's comments revealed its misunderstanding of the extent of Jelks' involvement in the Mosley murder as well as Jelks' lack of truthfulness when he spoke to the detectives -- the prosecutor failed to disclose the additional evidence in her possession that would have clarified the court's misunderstanding of this evidence.

The court's rationale for limiting the cross-examination of Jelks was based on the court's misunderstanding of the information provided by the prosecutor. The evidence withheld from the court by the prosecutor would have influenced the court to reverse its ruling and allow Appellant the opportunity to fully cross-examine and impeach Jelks. [AOB, 241-245]

The misconduct was prejudicial and resulted in the denial to Appellant of his right to confront and cross examine his accusers, and requires reversal of his conviction.

Issue #6

Appellant's Constitutional Right To Due Process And To Confront And Cross-Examine His Accusers Was Violated When The Trial Court Curtailed And Limited Appellant's cross-examination of Freddie Jelks, Detective McCartin and Detective Tapia, thereby making it impossible for Appellant to establish Jelks' testimony was false, involuntary, and the product of continuing police coercion. The trial court's error denied Appellant his Fifth, Sixth and Fourteenth Amendment rights to confront and cross-examine his accusers, as well as to present a defense. The errors were prejudicial, and they require reversal of Appellant's convictions and sentence of death.

Summary of Attorney General's Response [RB, 192, fn. 130] to Appellant's Argument #6 [AOB, 248-293]:

The Attorney General argues that Appellant "cites nothing in the record reflecting an attempt to exclude Jelks' testimony on these grounds." Hence, this claim on appeal should not be entertained by this Court. [RB, 192] If, however, the Court deems it appropriate to consider this issue in this appeal, the Attorney General requests the opportunity to file a supplemental brief to address the merits of Appellant's Argument #6. [RB, 192, fn. 130.]

<u>Appellant's Rebuttal to Attorney General's Response to Issue #6</u>:

Respondent urges the Court to not consider this particular claim because it was not properly preserved at trial. This Court should reject Respondent's argument for several reasons.

<u>First, the defense made adequate offers of proof to preserve this issue for appeal</u>.

Evid. Code, § 354 reiterates the requirement that Appellant Allen's conviction and sentence of death shall not be reversed because of the trial court's error in refusing to admit defense evidence unless the error "resulted in a miscarriage of justice and it appears that: (a) [t]he substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means;...."

Prior to Jelks' testimony, the defense made offers of proof as to why they should be allowed to confront and cross-examine Jelks regarding the coercive and untrustworthy nature of his testimony. Mr. Lasting told the court that Jelks "was under arrest at the police station, and being advised [by the detectives] that he was going to be arrested for murder unless he cooperated, and if he wanted to go home, he better be cooperative, in essence." [RT, 16:3500] Mr. Lasting also stated:

> RL: He [Jelks] was told by the police that he was either going to leave the police station as a witness for the police, or he was going to be booked on the [Mosley] murder, in essence, and he was given a choice, and

> he made a choice to provide information. <u>I think it goes to his bias. I think it goes to his motive. I think it goes to his credibility</u>. [RT, 16:3503. Emphasis added.]

In response to the prosecutor's representation to the court that no promises had been made to Jelks relative to his pending murder case and that "it's wide open", Appellant's counsel stated "That's not true." Appellant's counsel then told the court that during the interrogation of Jelks, and after he had "confessed" to the Mosley murder, the detectives, in effect, "held the [Mosley] murder ... over him" and told him if he told them what he knew about the Loggins/Beroit murders, they would not arrest him on the Mosley murder and would let him go home to be with his young family for Christmas. Otherwise, Appellant's counsel continued, the detectives told Jelks that he would be booked on the Mosley murder. [RT, 16:3500] Counsel's rather obvious point was the necessity of the defense being allowed to present to the jury evidence of Jelks' state of mind; that

> a) When the detectives let Jelks "walk out of the police station" *after* he had just confessed to his involvement in the Mosley murder, they had done so because Jelks had provided specific incriminating information regarding Appellant's and co-defendant Johnson's involvement in the Loggins/Beroit murders; and
>
> b) Even though Jelks subsequently had been arrested and charged with murdering Mosley, *only* if he continued to incriminate Appellant and co-defendant Johnson in the Loggins/Beroit murders was there a possibility that he would receive consideration from the prosecution regarding his pending murder case, as well as protection for his family and himself from gang retaliation.

When Mr. Orr was then asked by the court whether there was a warrant for Jelks' arrest on December 6, 1994 for the Mosley murder, Mr. Orr responded,

> Orr: I'm not sure of that. But they [the detectives] said, "We have enough to book you [Jelks] on [the Mosley

murder] now. You've been identified." And eventually they [the detectives] did book him and did arrest him on the [Mosley] murder case they used as bait to get his statement as to these two defendants [in the Loggins/Beroit killings]. [RT, 16:3501 (Words in brackets and punctuation are added by Appellant for clarification.)]

Again, the seemingly obvious point Mr. Orr made was that the detectives had used the threat of arresting him on the Mosley murder as leverage or "bait" to get Jelks to provide them with information regarding Johnson and Allen that the detectives wanted to hear, and that since the "bait" (the Mosley murder) was still pending, Jelks had a very strong need or incentive to continue to provide the same information that he now knew the prosecutor also wanted to hear. Otherwise, Jelks would believe he had no implied "promise" of leniency on his pending murder case; that is, he would receive no "pass for an alleged murder." [RT, 16:3500]

However, in spite of these offers of proof the trial court rejected them and proceeded to limit the scope of cross examination of Jelks (See Argument #4 in Appellant's Opening Brief, as well as Argument #4, herein).

Appellant's ability to establish the coercive nature of Jelks' testimony was effectively crippled when the trial court placed limitations on the scope of Appellant's cross-examination of Jelks and other key prosecution witnesses. It was otherwise inevitable that Appellant would have been able to demonstrate the coercive nature of Jelks' initial statement to the police and its continuing coercive impact on his trial testimony.

Second, even if the offers of proof were somewhat inarticulate, they were sufficient to preserve this issue for appeal.

This court has often stated the principle that where "the question whether defendant has preserved his right to raise this issue on appeal is

close and difficult, we assume he has preserved his right, and proceed to the merits. We have done the same in similar situations in the past." (*People v. Bruner* (1995) 9 Cal.4th 1178, 1183, fn. 5.) Further, this Court has promoted the view that an "objection is sufficient if it fairly apprises that trial court of the issue it is being called upon to decide." (*People v. Scott* (1978) 21 Cal.3d 284, 290.) In *People v. Bob* (1946) 29 Cal.2d 321, this Court stated:

> Notwithstanding the rule that the specific ground for an objection must be given and the particular portion of evidence which is inadmissible must be pointed out where other parts are admissible, "technicalities should be viewed liberally when urged against a criminal defendant in a criminal case. And the mere fact that the objection could have been made in better form will not justify a refusal to consider it, where the intention of the defendant could not be misunderstood. So also, if it is evident from the discussion over an objection between the court and counsel that another ground of objection perfectly obvious from the nature of the question, would have been overruled if made, this ground will be considered on appeal." (*People v. Bob* (1946) 29 Cal.2d 321, 325-26, citation omitted [failure to use the word "hearsay" when objecting to an out-of-court statement were not fatal to reviewing the question of admissibility where counsel's remarks inferred that ground]; see also *People v. Briggs* (1962) 58 Cal.2d 385, 410.)

This Court went on in *Bob* to hold that, just as hyper-technicality is less appropriate in criminal than in civil cases, it is even less appropriate in capital cases than in other criminal cases. (*People v. Bob* (1946) 29 Cal.2d 321, 328.) This Court punctuated that part of the *Bob* opinion in *People v. Frank* (1985) 38 Cal.3d 711, stating that

> ...while in a non-capital case a claim of erroneous admission of evidence will not be reviewed in the absence of a timely and proper objection [citation], we have long followed a different rule in capital cases. On appeal from a judgment imposing the penalty of death a technical insufficiency in the form of an objection will be disregarded and the entire record

> will be examined to determine is a miscarriage of justice resulted. [citation] The United States Supreme Court has stated that death is "profoundly different from all other penalties" [citation] and . . . a capital defendant is therefore entitled to enhanced procedural protections against arbitrary infliction of the supreme penalty. Indeed, in capital cases, this Court "will review errors even when defense counsel has failed to complain of them on appeal [citation]."
> (*People v. Frank* (1985) 38 Cal.3d 711, 729, fn. 3.)

Third, even if the defense did not make an adequate offer of proof as to this issue, this Court should exercise its discretion and consider this issue on its merits.

Whether to consider claims advanced for the first time on appeal is a matter of discretion, governed by no bright-line rule. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.) Respondent does not articulate any specific reason why this Court should not exercise that discretion *in favor of* consideration of this claim on its merits.[10]

The United States Supreme Court has stated that death is "profoundly different from all other penalties" (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 110 [L.Ed.1, 8, 102 S.Ct. 869].) Furthermore, "a capital defendant is therefore entitled to enhanced procedural protections against arbitrary infliction of the supreme penalty." (*People v. Easley*

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[10] The contemporaneous objection rule is not an end in itself. It exists so that the opposing party and the trial court can cure error before it becomes prejudicial. (*People v. Saunders* (1993) 5 Cal.4th 580, 590; see also *People v. Ray* (1996) 13 Cal.4th 313, 339; see generally *Stutson v. United States* (1996) 516 U.S. 193, 196 [inappropriate to "allow technicalities which caused no prejudice to the prosecution" to preclude appellate review of a criminal defendant's claims].) When, as is frequently true if the issue is one of law, there is nothing that the opposing party or the trial court could have or would have done differently had the objection been made, enforcing the contemporaneous objection rule serves no purpose. (*United States v. Cretacci* (9th Cir. 1995) 62 F.3d 307, 310; *United States v. Carlson* (9th Cir. 1990) 900 F.2d 1346, 1349; *United States v. Patrin* (9th Cir. 1978) 575 F.2d 708, 712.)

(1983) 34 Cal.3d 858, 864)[11] Indeed, in capital cases, this Court will "review errors even when defense counsel has failed to complain of them on appeal. [Citations Omitted] (*People v. Frank* (1985) 38 Cal.3d 711, 729, fn. 3.) Consistent with this language, this Court has stated that Penal Code section 1239, subdivision (b) imposes "a duty upon this court to make an examination of the complete record of the proceedings ... to the end that it be ascertained whether defendant was given a fair trial." (*People v. Easley* (1983) 34 Cal.3d 858, 863)

For more than half a century, this Court has abided by the principle enunciated in *People v. Bob* (1946) 29 Cal.2d. 321 that a liberal view be taken in determining whether to consider issues raised for the first time on appeal in capital cases:

> The Legislature of California has taken extraordinary precaution to safeguard the rights of those upon whom the death penalty is imposed by the trial court, by providing for an automatic appeal to the Supreme Court of this state in all such cases (Pen. Code, § 1239) and enjoining upon this court an examination of the record and the preparation of a formal opinion and decision from which it should appear that no miscarriage of justice has resulted. In view of this declared policy, and the fact known to this court that many capital cases are defended by counsel appointed by the court who may be inexperienced in the handling of criminal cases, it would seem appropriate for this court to take a liberal view of the technical rules applicable to criminal cases generally [citation] and examine the record with the view of determining whether or not in the light of all that transpired at the trial of the case a miscarriage of justice has resulted. (*People v. Bob* (1946) 29 Cal.2d. 321, 328)

[11] In *Easley*, this Court reversed a judgment of death upon grounds raised for the first time in an *amicus curiae* brief in support of a petition for rehearing. Further, this Court *also* considered the merits of other claims not objected to at trial. (*People v. Easley* (1983) 34 Cal.3d 858, 869-872.)

Respondent relies upon *People v. Champion* (1995) 9 Cal.4th 879 to support its position that this Court should decline to consider this issue in this appeal. In *Champion,* this Court declined to consider Champion's due process claim on appeal because it was not properly preserved at trial. Therein, Champion failed to object to the *introduction* of evidence relating to another murder during the prosecution's case-in-chief. At the close of the prosecutions' case, Champion finally objected to the introduction of the *exhibits* relating to the other murder "because of the total irrelevance of [the other murder] case." (*People v. Champion* (1995) 9 Cal.4th 879, 918.)

However, Respondent's "waiver argument" is undermined by the *Champion* case itself. First, *Champion* clearly identifies the discretionary nature of the rule:

> "*Generally*, reviewing courts will not consider a challenge to the admissibility of evidence absent a specific and timely objection in the trial court on the ground sought to be urged on appeal." (*Id.* at p. 918, internal citations omitted; Evid. Code, §353, subd. (a).)

Second, Respondent's argument is further undermined because the *Champion* Court actually considered the claim *on its merits* and stated that any error was harmless. This strengthens the implication that reviewing courts are less likely to apply the *general rule* in the presence of potential *prejudicial error* of constitutional magnitude. When the question whether Appellant has preserved his right to raise an issue on appeal is close and difficult, this Court has in similar situations assumed that Appellant did preserve the right, and has proceeded to consider the issue on the merits. (See, e.g., *People v. Fudge* (1994) 7 Cal.4th 1075, 1106-07; *People v. Pinholster* (1992) 1 Cal.4th 865, 912; *People v. Malone* (1988) 47 Cal.3d 1, 38; *People v. McLain* (1988) 46 Cal.3d 97, 110; *People v. Miranda* (1987) 44 Cal.3d 57, 85)

The Error Was Prejudicial.

Witness Freddie Jelks' testimony was the product of continuing police coercion that made it involuntary as a matter of law and, therefore, inadmissible. His testimony violated Appellant's right to due process and a fair trial. Appellant was not allowed to establish this, however, because the trial court limited Appellant's ability to confront and cross-examine Freddie Jelks and Detective McCartin. [AOB, 248-256]

Specifically,

1. The interrogation tactics used by the detectives coerced Jelks into making a false, involuntary and untrustworthy confession to his own involvement in a murder case that was pending against him at the time of Appellant's trial. Part of this tactic was telling Jelks that if he wanted any benefit in his pending murder case, he had to *convince the district attorney that he would be a valuable witness* for the district attorney against the co-defendants in that case. [AOB, 256-272]

2. Using Jelks' subsequent "confession" as leverage, the detectives pressured Jelks to *continue to please the prosecution*, by telling them about the murders of Loggins/Beroit. Jelks then incriminated Appellant and co-defendant Johnson, individuals whom the detectives had previously told Jelks they wanted to put in prison. [AOB, 272-273]

3. Additional portions of the interrogation demonstrated Jelks' "need" to please law enforcement, and this "need to please" the prosecution continued during his trial testimony in this case. [AOB, 273-280]

Further, Appellant argues that Jelks' interrogation and subsequent testimony are analogous to the law of successive confessions wherein coercion in the initial confession must be "purged" before the latter confession is deemed admissible. [AOB, 280-283]

Finally, the prejudicial nature of the error was exacerbated by the prosecutor in her closing argument to the jury. [AOB, 283-292]

For the reasons stated in Argument #6 in Appellant's Opening Brief, as well as the reasons stated herein, Appellant Allen respectfully urges this Court consider this claim on its merits and reverse Appellant's convictions and judgment of death.

ISSUE #7

The trial Court Abused Its Discretion When It Refused To Allow Appellant To Confront, Cross-Examine And Impeach Detective McCartin Regarding Details Of His Initial Interrogation Of Freddie Jelks, As Well As Details Of Jelks Pending Murder Case. The Trial Court's Error Denied Appellant His Fifth, Sixth And Fourteenth Amendment Rights To Confront And Cross-Examine His Accusers, As Well As To Present a Defense. The Errors Were Prejudicial, And Require Reversal Of Appellants' Convictions And Sentence Of Death.

Summary of Attorney General's Response [RB, 194-198] to Appellants Argument #7 [AOB, 293-319]:

Respondent argues the trial court did not err and abuse its discretion because it did not limit Appellant's ability to confront and cross-examine Detective McCartin. [RB, 190-194, 196] Respondent claims there is nothing in the ruling that prevented Allen from eliciting any of the things he identifies as out-of-reach. (RB, 197-198)

. Even if McCartin's testimony did mislead the jury with regard to Jelks testimony, Respondent asserts the claim was waived because "Allen does not cite any objection to, or any thwarted attempt, to cross-examine McCartin regarding the alleged inaccuracies in his testimony." (RB, 197-198)

Appellants' Rebuttal Argument to Attorney General's Response to Issue #7:

Contrary to Respondent's assertion, the trial court's prior ruling (See Argument #4) that restricted the cross-examination of Jelks *prevented* Appellant from meaningfully cross-examining Detective McCartin

regarding portions of his testimony that at times was *directly contradicted* by the discussions contained in the interrogation of Jelks. Further, some of the prohibited cross-examination would also have undermined significantly the credibility of Freddie Jelks.

Respondent intimates that defense counsel should have repeatedly objected, and/or repeatedly renewed his objection to the court's ruling regarding the details of Jelks' pending case and police interrogation in order to preserve this issue for appeal. This is an untenable position. In essence, Respondent suggests defense counsel must risk alienating the jury with constant objections that might create the impression that defense counsel is simply badgering prosecution witnesses.

Defense counsel's failure to repeatedly object does not waive this error on appeal. (See, *Green v. Southern Pacific Co.* (1898) 122 Cal. 563, 565, 55 P. 577 [Once a party has formally made an objection, he is not required to renew the objection at each re-occurrence thereafter]; *People v. Woods* (1991) 226 Cal.App.3d 1037, 1051 [same]; *People v. Calio* (1986) 42 Cal.3d 639, 643 [" 'an attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions, does not waive the error in the ruling by proceeding in accordance therewith and endeavoring to make the best of a bad situation for which he was not responsible.' [Citation.]"]; *People v. Carpenter* (1999) 21 Cal. 4th 1016 [Propriety of impeaching a capital murder defendant with two prior theft convictions was preserved for appeal by defendant's pretrial objection and by the holding of a pretrial hearing, even though defendant did not renew his objection at trial].

As stated in Argument #4 in Appellant's Opening Brief [AOB, 188; RT, 16:3601-3603], as well as Argument #4 in this Reply Brief, Appellant did object to the restriction on cross-examination that prohibited Appellant from delving into the details of Detective McCartin's interrogation of Jelks,

whether it was on cross-examination of Jelks or Detective McCartin. The court expressly overruled Appellant's objection and limited Appellant's right to delve into the details of Jelks interrogation that would have significantly impeached the credibility of Detective McCartin (as well as Jelks).

If the court had allowed Appellant to question Detective McCartin regarding the details of the Jelks interrogation, Appellant would have been able to impeach the detective by establishing the following:

a. Detective McCartin mislead the jury into believing that the reason Jelks was reluctant to talk to the detectives and initially lied to them was because he was extremely afraid the gang would retaliate against him and his young children if he talked to the detectives about the Loggins/Beroit murders and "snitched off" Appellant and co-defendant Johnson. (See AOB, 298)

b. Detective McCartin mislead the jury into believing that the detectives *never threatened* to arrest Jelks for the Mosley murder if he did not talk to them during the December 5, 1994 interrogation. (See AOB, 302)

c. Detective McCartin mislead the jury into believing that the detectives *never promised* Jelks that they would let him go home at the conclusion of the interrogation if he told them what they wanted to hear. (See AOB, 306)

d. Detective McCartin mislead the jury into believing that the detectives *never* "told Jelks what to say." (See AOB, 310)

e. Detective McCartin mislead the jury into believing that because Jelks confessed to involvement in his own serious crime, this indicated he was also truthful when talking about the Loggins/Beroit case. (See AOB, 315)

The error was not harmless.

Prejudice inures from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. (*Alvarado v. Superior Court of Los Angeles County* (2000) 23 Cal.4th 1121. A trial court's limitation on cross-examination of a witness pertaining to the witness' credibility violates the confrontation clause if a reasonable jury might have received a significantly different impression of the witness' credibility had the excluded cross-examination been permitted. (*People v. Ayala* (2000) 23 Cal.4th 225.

Further, the prosecutor's questions on direct and re-direct examination "opened the door" to Appellant's right to confront and cross-examine Detective McCartin, as well as Freddie Jelks, regarding the details of the interrogation of Jelks and his pending murder case.

The excluded evidence was relevant and admissible under *Davis v. Alaska* (1974) 415 U.S. 308, 317, because it was essential the defense establish a) that Jelks fabricated his testimony, and b) Detective McCartin misled the jury regarding Jelks' reliability. More fundamentally, the court's ruling denied Appellant his constitutional right to present all favorable relevant evidence of significant probative value. (*Washington v. Texas* (1967) 388 U.S. 14, 19.)

Conclusion.

Appellant submits that the jury would have received a significantly different impression of the credibility of Detective McCartin, as well as that of Freddie Jelks, had the defense been allowed to properly cross-examine McCartin and bring to light all of the above. Accordingly, Appellant respectfully requests this Court overturn his convictions and sentence of death.

ISSUE #8

The Trial Court Abused Its Discretion When It Refused To Allow Appellant To Confront, Cross-Examine And Impeach Detective Sanchez Regarding Her Conduct And State Of Mind As She Escorted Freddie Jelks To And From Court During The Trial. The Trial Court's Error Denied Appellant His Constitutional Rights To Due Process And To A Fair Trial: The Error Was Prejudicial, And Requires Reversal Of Appellant's Convictions And Sentence Of Death.

Summary of Attorney General's Response [RB, 198-200] to Appellant's Issue #8 [AOB, 319-333]:

Respondent argues the trial court did not err and abuse its discretion because it did not limit Appellant's ability to confront and cross-examine Det. Sanchez. [RB, 198-200] Respondent claims that Appellant made no attempt to cross-examine Detective Sanchez in the manner suggested in his opening brief; thus, this claim was waived. [RB, 200]

Respondent also argues that any error was harmless. [RB, 200]

Appellant's Rebuttal Argument to Attorney General's Response to Issue #8:

Contrary to Respondent's assertion, the trial court's prior ruling (See Argument #4) that restricted the cross-examination of Jelks *prevented* Appellant from meaningfully cross-examining Detective Sanchez regarding portions of her testimony that at times were inherently unbelievable ... but *only* if the jury had been allowed to know the details of Jelks' pending case, his evasive and dishonest responses during his interrogation, and eventually the utter necessity in his mind of ingratiating himself to law enforcement and the prosecution.

As stated in detail in Appellant's Reply Brief, Argument #7, *supra*, "[o]nce a party has formally made an objection, he is not required to renew the objection at each re-occurrence thereafter. (*People v. Woods* (1991) 226

Cal.A3d 1037, 1051; see also *People v. Calio* (1986) 42 Cal.3d 639, 643; *People v. Carpenter* (1999) 21 Cal. 4th 1016.)

The nature of Appellant's intended cross-examination of Detective Sanchez was obvious; it required no offer of proof. (Evid. Code, §354) Jelks had been indicted for a violent and senseless gang-related drive-by murder in which two other innocent people had been seriously wounded. His trial was pending, he could not post bail, and he was looking at spending the rest of his life in prison. His high bail was based on the fact that he posed a high risk of flight and he was considered a great danger to the public (See Penal Code, §1275). The trial court was fully aware of the above. Yet Jelks had been portrayed by Detective Sanchez as someone who was *not* a flight risk; someone who "hasn't displayed any behavior where I had any concern about that. He has been in custody for a while and nothing had happened." [RT, 18:3988-3989]

Appellant respectfully submits that, had the jury been told the facts of Jelks' pending case, the jury would have found Detective Sanchez' explanation for her lenient treatment of Jelks ludicrous. This would have caused the jury to question the detective's other testimony because of her inherent bias in favor of keeping the prosecution's "star" informant-witness comfortable and happy.

Finally, it was the prosecutor who "opened the door" to this testimony during direct examination of Detective Sanchez. [AOB, 321; RT, 18:3988-3989] Any undue prejudice to the prosecution was created by the prosecution [AOB, 328], any prejudice to the prosecution was minimal, and it certainly did not "substantially outweigh" the probative value of impeaching Detective Sanchez *and* Freddie Jelks. [AOB, 328-329] This error was an abuse of discretion and was prejudicial beyond a reasonable doubt. [AOB, 328-333]

ISSUE #9:

The Trial Court Erred When It Allowed The Prosecution To Introduce Irrelevant Evidence And Inadmissible Opinion Evidence That Improperly "Bolstered" The Credibility Of Witness Freddie Jelks. The Errors Were Prejudicial, And Require Reversal Of Appellant's Convictions And Sentence Of Death.

Summary of Attorney General's Response [RB 175-177] to Appellant's Issue #9 [AOB 333-356]:

1. Jelks' Information Being Corroborated by Other Sources.

   Respondent argues that Appellant waived the right to raise this issue on appeal because he failed to object during trial. Respondent further suggests any error was "very brief" and, in effect, harmless. [RB, 175-176]

2. Detective McCartin's Opinions Regarding the "Ruse" Used in Jelks' Interrogation.

Respondent argues any erro. was waived and, regardless, it was harmless. [RB, 176-177] Rather surprisingly, Respondent further claims that Detective McCartin, a Los Angeles police officer, qualified as an expert witness on the *law* of what constitutes admissible and inadmissible confessions. Hence, there was no error. [RB, 177][12]

Appellant's Rebuttal Argument to Attorney General's Response to Issue #9:

As stated in considerable detail in Appellant's Opening Brief, Freddie Jelks' credibility was at the very heart of this case. He was the only witness who testified he saw Appellant obtain the gun, leave, and then return after the shooting with the gun. He further testified that Appellant Allen confessed to his involvement in the murders. Because of the

[12] Each case cited by Respondent for this position simply does *not* support Respondent's position that a police officer qualifies as an expert witness on the law of confessions.

importance of attacking the credibility of this key prosecution witness, the defense sought to introduce evidence on cross-examination to properly and legally impeach Jelks' credibility. [See Arguments #4, 6, 7, and 8 in AOB and this Reply Brief] There was a very good chance that the jury would have rejected Jelks' testimony in its entirety ... until the court limited the scope of cross-examination of Jelks, then allowed the prosecution to *improperly bolster* Jelks' credibility through the inadmissible testimony of a veteran, respected police investigator. The impact of this inadmissible rehabilitation evidence, coming from a highly credible witness, cannot be underestimated.

Respondent's answer to these allegations is cursory and superficial. Respondent seeks to minimize and trivialize the errors. For example, to suggest the prosecution properly qualified Detective McCartin to testify as an expert witness on the law of confessions, pursuant to Evid. Code §§405, 720 and 801, illustrates the trivial treatment given to this issue. Indeed, there is nothing in the Reporter's Transcript that even remotely suggests the court conducted a preliminary fact determination pursuant to Evid. Code §405 to determine if Detective McCartin qualified as a legal expert on the law of confessions. Yet over objection, the court would have been duty-bound to conduct such a hearing. (*People v. Alcala* (1992, modified, 1993) 4 Cal.4th 742, 787 [It is for the court, not the jury, to determine the existence or non-existence of a preliminary fact under §405.] Further, there is nothing in the Reporter's Transcript that suggests Detective McCartin possessed such expertise to render an expert opinion on the law of confessions. (See *People v. Kelly* (1976) 17 Cal.3d 24 [An expert's "field of expertise must be carefully distinguished and limited."]) Yet, it is necessary to establish that expertise *before* an expert opinion is admissible. [See Evid. Code, §405, 720, 801]

The trial court erred when it allowed the prosecution to improperly bolster the credibility of Freddie Jelks, while at the same time refusing to allow Appellant to adequately impeach Jelks. [AOB, 333-335] Appellant cited and discussed three (3) examples:

1. Detective McCartin was allowed to testify that Jelks' fears of retaliation were "legitimate", and that this was the reason Jelks waited 3 ½ years after the shootings before talking to the police. [AOB, 335-340]
2. Detective McCartin was allowed to testify that Jelks' testimony was truthful because it was consistent with other information he had learned during the investigation of this case. [AOB, 340-347]
3. Detective McCartin was allowed to testify that an interrogation tactic used by detectives in their interrogation of Jelks had been approved by the courts because there was little danger it would lead to false statements. [AOB, 347-349]

This inadmissible testimony that bolstered Jelks' credibility, coupled with the court's refusal to allow Appellant to adequately impeach Jelks, was prejudicial and deprived Appellant of his right to due process and a fair trial. [See AOB, 349-356]

CLAIM OF ERROR REGARDING WITNESS MARCELLUS JAMES [Issues #10]

ISSUE #10:

The Trial Court Abused Its Discretion When It Refused To Allow Appellant To Confront, Cross-Examine And Impeach Marcellus James Regarding His In-Custody Interview With The Police On February 22, 1992. The Trial Court's Error Denied Appellant His Due Process Right To Confront And Cross-Examine His Accusers, The Error Was Prejudicial, And It Requires Reversal Of Appellant's Conviction.

Summary of Attorney General's Response [RB, 207-215] to Appellant's Argument #10 [AOB, 356-378]:

Respondent argues the trial court did not err and abuse its discretion because it did not limit Appellant's ability to confront and cross-examine Marcellus James regarding his interview with the police on 2-27-1992. [RB, 207-215] Further, any cross-examination would have revealed nothing that could have been used to impeach James. [RB, 211-215] Finally, even if Appellant could have shown that James received a benefit for information provided to the police on 2-27-1992, this information would not have changed the jury's perception of James' credibility. Hence, any error would be harmless. [RB, 212]

Appellant's Rebuttal Argument to Issue #10:

Respondent's argument fails to rebut each of the three (3) separate and distinct reasons why the court erred when it disallowed Appellant the opportunity to question Marcellus James regarding his February 27, 1992 in-custody interview with the police.

Reason #1 [AOB, 363]:

Respondent claims there is nothing in the record that indicates Appellant's confession to James occurred prior to 2-27-1992; hence, cross examination of James would not have established James concealed this information from the police on 2-27-1992. [RB, 211-212] Hence, the Attorney General argues, James would not have spoken to the police on 2-27-1992 about Appellant's confession regarding the Loggins/Beroit murders because there is nothing in the record that suggests that confession occurred prior to 2-27-1992.

However, as Appellant pointed out in his Opening Brief [AOB, 359, including footnote 207] on cross-examination James indicated he had this discussion with Appellant in 1991 while he was still living in that

neighborhood. [RT, 18:4072-4074] Although James, in prior statements to the police, alluded to the fact that this conversation with Appellant may have occurred in 1992 or 1993, at trial James' testified the conversation occurred in 1991, prior to his moving from the neighborhood and, therefore, prior to his in-custody interview with the police on February 27, 1992.[13] If James' testimony was that he said nothing to the police during this February interview, the jury may well have concluded that James had "made it up" in 1994 when he tried to ingratiate himself with the police after being arrested again. Otherwise, he would have told the police of Appellant Allen's alleged confession in February 1992 when he told the police about the Mosley murder involving Jelks and co-defendant Johnson.

Reason #2 [AOB, 363]:

The Attorney General further claims there is nothing in the record that indicates James provided any information to the police regarding the Loggins/Beroit murders, and that there is nothing in the record that James received any benefit for having provided information to the police on 2-27-1992. [RB, 212] Hence, any cross-examination would have been futile.

However, only through cross-examination of James could Appellant have established whether James provided information to the police on 2-27-1992 regarding the Loggins/Beroit murders. Additionally, only through cross-examination could Appellant have established whether James received any benefit for providing information to the police on 2-27-1992, whether the information pertained to the Mosley murder or the Loggins/Beroit murders.[14] Since the trial court *refused* to allow Appellant

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[13] The Attorney General acknowledges this ambiguity when he writes, "Rather, it appears that their conversation *may have taken place* later, in May 1992." [RB, 211. Emphasis added.]

[14] As Appellant wrote [at AOB, 361, footnote 208], defense counsel for Appellant and co-defendant Johnson apparently were not provided any discovery regarding the details of the 2-27-1992 police interview of James

the opportunity to confront James about what he told the police on 2-27-1992, the record is obviously silent as to what James told the police on that date. For this reason, the lack of any indication on the record that James received any benefit for providing information to the police on 2-27-1992 is understandable and should not defeat this claim of error.

Reason #3 [AOB, 364]

Finally, the Attorney General argues that Appellant made no offer of proof at trial that he wanted to challenge James' claim that he waited over 3 years to report to the police Appellant's confession because he feared for his safety; that this claim of error has been waived for lack of an offer of proof being made at trial. [RB, 214]

However, the trial court had made it very clear on numerous previous occasions that the defense would *not* be allowed to explore the details of the Mosley murder in any way through cross-examination of any witness. This prohibition on asking any questions regarding the Mosley murder was again made very clear to Appellant's trial counsel at least twice. [See RT, 18:4051-4053; AOB, 361-362] Hence, any offer of proof as to why Appellant sought to cross-examine James regarding anything to do with the Mosley murder would have been rejected by the court.[15]

Finally, Respondent argues any error was harmless since "the jury was aware of the key facts which negatively impacted James' credibility." [RB, 215] Appellant argues in detail in his Opening Brief as to why the

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prior to trial. This can be inferred from their statements to the court. [RT, 18:4051-4052]

[15] The Attorney General argues that Appellant's trial counsel expressly withdrew any request to question James regarding the Mosley murder. [RB, 214; RT, 18:4052] Defense counsel's statement-- "I wasn't going to go into that"—is cited out of context. Counsel was referring to avoiding questions regarding the details of the Mosley murder itself, *not* the mere fact that James talked to the police about the Mosley murder and whether he feared for his safety at that time (2-27-1992) See AOB, 359-362]

court's restriction on cross-examination of James was an abuse of discretion and not harmless error. [AOB, 369-377] Appellant respectfully refers the Court to his AOB for that discussion.

Conclusion:

Because Marcellus James was one of three prosecution witnesses who provided testimony that Appellant Allen was the shooter, any limitation on Appellant Allen's ability to adequately confront and cross-examine James must be considered carefully by the reviewing court. In addition to the three (3) reasons discussed by Appellant in his Opening Brief, the error was compounded when the prosecutor argued James was a credible witness. Appellant was unable to refute the prosecutor's closing argument because the court had refused to allow him to cross-examine James and establish that a) James had a strong motive to ingratiate himself with the police by fabricating Appellant's alleged confession (i.e., James was hoping to receive a benefit in his own pending criminal case), and b) James' alleged fear of retaliation was not genuine.

For the reasons discussed in Appellant's Opening Brief, as well as the above discussion, Appellant respectfully urges this Court reverse his conviction and judgment of death.

CLAIMS OF ERROR REGARDING GANG EVIDENCE [Issues 11-15]:

ISSUE #11

The Trial Court Erred And Abused Its Discretion When It Allowed The Prosecution To Introduce Extensive, Inflammatory And Highly Prejudicial Gang Evidence For The Ostensible Purpose Of Circumstantially Proving The State Of Mind Of Certain Witnesses. The Errors Were Prejudicial And Require Appellant's Convictions And Judgment Of Death Be Reversed

Summary of Attorney General's Response [RB, 90-103] to Appellant's Argument #11 [AOB, 378-427]:

Respondent summarily dismisses Appellant Allen's Argument #11 by claiming the complained-of gang evidence a) was properly admitted to establish that witnesses Connor, Jelks and James were fearful of retaliation if they testified, b) that any error was waived for lack of objection[16], and c) even if error, admission of the gang evidence was harmless. [RB 90-103]

Appellant's Rebuttal Argument to Attorney General's Response to Issue #11:

In Respondent's Brief, Respondent misunderstands and misconstrues Appellant Allen's argument raised in Issue #11. Appellant acknowledges that gang evidence may be relevant and admissible to circumstantially attack or support the credibility of a witness by proving some aspect of a witness' state of mind, such as fear. (*People v. Ayala* (2000) 23 Cal.4th 225)

However, when that is the prosecution's purpose for introducing gang evidence, it is imperative that

a. the prosecutor's questions are *clearly phrased* in such a manner that the jury understands the gang evidence is being introduced to prove the subjective state of mind of the witness; and

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[16] Respondent claims Appellant did not object to evidence pertaining to the Nece Jones murder citing only to RT, 3388-3389. [RB, 94] Appellant cites to RT, 3385-3389 wherein objections by both Appellant's counsel and co-defendant Johnson's counsel are made. Further, of the 37 different examples of objectionable evidence identified by Appellant in his Opening Brief, defense counsel interposed at least 12 different objections, almost all of which were overruled by the trial court. Appellant respectfully refers the Court to his discussion of inarticulate objections [ARB, #6 p4-5]; failure to object not amounting to waiver [ARB, #6 p5-6]; and the discretionary nature of the contemporaneous objection rule. [ARB, #6 p6-8]

b. the trial court instructs the jury that the gang evidence is to be considered for the *sole purpose* of the witness' state of mind, regardless of whether the evidence consists of reputation, opinion or specific acts.

Further, if the prosecutor's questions are inartfully or ambiguously phrased, such that the question refers to something *other than* the witness' state of mind, *any* specific and timely objection by the defense should be sustained, and the trial court errs when it fails to do so.[17]

Unfortunately, most of the prosecutor's questions were ambiguous and were not narrowly focused on the state of mind of the particular witness. The jury may well have considered the elicited answers in determining the state of mind of the prosecution witnesses; however, the questions themselves were not limited to the state of mind of the particular witness. Hence, the jury was just as likely to consider the answers for numerous inadmissible and highly prejudicial reasons. Further, the cumulative nature of the gang evidence introduced in this manner exacerbated the likelihood that the jury *did* consider the gang evidence for inadmissible and highly prejudicial reasons.

Respondent omits any discussion of this issue raised by Appellant, simply relying upon the argument that the questions and answers *could have been* considered by the jury as to the state of mind of the witnesses. While that may be true, this alone does not excuse the introduction of voluminous, highly prejudicial gang evidence that more likely than not, *was* used by the jury for improper purposes.

Appellant identified and discussed *ad nauseam* 37 separate examples from the trial in his Opening Brief of gang evidence--allegedly admitted to

[17] By sustaining the defense' objection, the prosecutor would be *forced* to re-phrase her question in a manner that prominently illustrates -- the answer to the question establishes the witness' state of mind.

prove the state of mind of Connor, Jelks, and James[18]—but which were introduced in a manner that freed the jury to consider each example for *inadmissible* reasons. [AOB, 383-417] Therein, Appellant discusses the problem with each example of gang evidence admitted. Appellant respectfully refers the Court to these examples; they speak for themselves.

Finally, the error was not harmless. The jury was improperly provided with such a voluminous and malevolent amount of gang evidence. Appellant contends that no reasonable juror could have put aside his or her emotional feelings of abhorrence and revulsion of the members of the 89 Family Bloods Gang. The prosecution emphasized again and again that Appellant was an active member of that vile gang, thereby attaching the same violent, intimidating and retaliatory characteristics and propensities of that gang, directly upon Appellant. To suggest that any error was harmless and that the jury would not have been unduly influenced by that evidence would be nonsensical. This is true despite the fact the court gave some limiting instructions, already of questionable validity[19], and particularly when the instructions pertain to highly emotional, inflammatory and frightening evidence.

Conclusion:

For the reasons state above, in addition to the argument presented in the Appellant's Opening Brief, Appellant respectfully urges this Court overturn his conviction and judgment of death.

ISSUE #12

[18] Nine (9) examples regarding Connor, seventeen (17) examples regarding Jelks, and ten (10) examples regarding James. [AOB, 384-418]

[19] See discussion of the effectiveness of limiting instructions as first detailed in AOB [594-595] and further expanded in ARB [Issue #17 p2-3].

The Trial Court Erred When It Allowed Detective Barling To Render *Expert* Testimony On Specific Gang-Related Subjects. The Errors Were Prejudicial And Require Appellants' Convictions And Judgment Of Death Be Reversed

Summary of Attorney General's Response [RB, 103-124] to Appellants Argument #12 [AOB, 427-494]:

Respondent argues that any claim of error regarding whether Detective Barling had sufficient expertise "to give [expert] testimony" was waived for lack of objection. [RB, 109] Respondent asserts further that even if an objection had been made and overruled, the court did not err because Detective Barling "was amply qualified" to testify regarding the 89 Family Bloods gang and its individual members. [RB, 109] Respondent then discusses the four (4) specific claims of error raised by Appellant Allen:

Appellants' Rebuttal Argument to Attorney General's Response to Issue #12:

First, Respondent contends that Detective Barling's opinion testimony was not inadmissible character evidence; rather, the detective's testimony was proper because he talked about the "status" of Appellant and co-defendant Johnson in the gang; that co-defendant Johnson enjoyed a certain high level of "respect" within the gang and that Appellant, "who was not as respected as [co-defendant Johnson] would have volunteered to perform it." Further, there was no undue prejudice. [RB, 113-117]

Respondent's argument is nothing short of sophistry.

Arguably, a gang expert could testify that gang members *in general* may commit violent crimes in order to increase their reputation for violence within their gang. Hence, *generally speaking*, a gang member without a reputation for violence might commit a violent crime to increase his reputation for violence within the gang. This could, *generally speaking*, be

the motivation for a shooting. (See *People v. Killebrew* (2002) 103 Cal.App.4th 644, 656-658)

However, this was *not* the testimony of Detective Barling. Rather, the detective testified *specifically* as to *why* Appellant committed the shootings. In effect, he was allowed to render his own personal opinion as to Appellant's subjective thought processes.[20] In his Opening Brief, Appellant cited numerous examples of Barling's testimony that pertained *specifically* to Appellant, co-defendant Johnson, and their subjective thought processes. In no way can it be said that Barling's testimony referred to the mental state of gang members *generally*. Appellant respectfully requests the Court refer to his discussion therein. [AOB, 444-450]

Detective Barling's "expert" testimony in this regard was identical with the "expert" testimony of gang expert Darbee in *Killebrew*, testimony that was condemned by that court. Quoting the language found in *Killebrew*, but inserting Barling's name in place of Darbee's, the error becomes obvious:

> In other words, [Barling] testified to the subjective ... [motive] and intent of [Appellant]. Such testimony is much different from the expectations of gang members in general when confronted with a specific action.
>
> [Barling's] testimony was the only evidence offered by the People to establish [Appellant's motive for] the crime. As such, it is the type of opinion that did nothing more than inform the jury how [Barling] believed the case should be decided. It was an improper opinion on the ultimate issue and should have been excluded. (Citation)

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[20] Even the most experienced and qualified psychiatrists, psychologists and behavioral scientists normally are not permitted to render opinions as to the subjective mental state of a specific individual. If these learned witnesses are prohibited from such testimony, it goes without saying that Detective Barling, with his much more limited education, experience, and training in this area, would be prohibited from rendering such opinion testimony.

> [Barling] simply informed the jury of his belief of [Appellant's motive and] intent …, issues properly reserved to the trier of fact. [Barling's] beliefs were irrelevant. (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 656-658)

Second, Respondent argues that the detective's testimony that the shooting "sent a message" to the rival gang was proper because it was relevant to establish the motive for this particular shooting. [RB, 117-118]

Barling's testimony may well have been relevant, but that does *not* justify its admission if his opinion was based simply on speculation or was his own personal opinion.

Once again, Barling's "expert" testimony was not about gang crimes *in general*. Rather, he was asked about a specific shooting that occurred at the specific boundary line between the 89 Family Bloods gang and the East Coast Crips gang (i.e., Central Avenue), and at the same specific time of day (i.e., 3 to 4 PM). In his Opening Brief, Appellant discussed in detail how, on cross-examination of Barling, it became apparent that he was simply speculating as to the significance or meaning of a shooting at that specific location and at that specific time of day. [AOB, 459-465] Barling "simply informed the jury of his belief [of the significance of that particular shooting, an issue] properly reserved to the trier of fact. [Barling's] beliefs were irrelevant. (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 656-658)

Third, Respondent also maintains Detective Barling could properly render an "expert opinion" that the specific chicken coop in co-defendant Johnson's backyard was, in fact, that gang's weapons repository. [RB, 118-120]

Once again, Appellant acknowledges that a gang expert could properly testify that, *generally speaking*, gangs often have a location within the gang territory where they store their weapons. When Freddie Jelks,

who claimed he had personal knowledge, testified that the 89 Family Bloods gang stored their weapons in the chicken coop in co-defendant Johnson's backyard, the jury was perfectly capable of drawing the inference that the chicken coop was probably the "weapons repository" of the gang. To suggest the jury needed the "expert opinion" of Barling to draw this inference borders on the ridiculous.[21]

Unless Barling had *personal knowledge* as to the specific location where the 89 Family Bloods stored their weapons[22], his "opinion" testimony was inadmissible. In this case, his opinion testimony was "the type of opinion that did nothing more than inform the jury" of his own *personal* belief, an issue "properly reserved to the trier of fact. [Barling's] beliefs were irrelevant." (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 656-658)

The prejudice of this testimony is patently obvious. Jelks' testimony was sufficient to establish the location of the weapons repository, but Jelks' credibility was vigorously disputed by the defense. When the court allowed this improper opinion testimony by Barling, the prosecution succeeded in improperly bolstering Jelks' beleaguered credibility.

Finally, Respondent claims there was no error when Detective Barling was allowed to testify that the "fear" of retaliation expressed by Connor, Jelks and James was "legitimate." [RB, 121-123]

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[21] Evid. Code 801(a) states that for an expert's opinion to be admissible, it "must be sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." Appellant acknowledges that the idea that gangs, generally speaking, have a repository for their weapons is "sufficiently beyond the common experience" of most jurors. Hence, that expert opinion testimony would be proper. No juror, however, would need the assistance of an expert to interpret Jelks' testimony.

[22] If opinion testimony does not qualify as "expert" opinion testimony, to be admissible it must qualify as "lay" opinion testimony. The latter requires personal knowledge. Evid. Code, § 800.

In Appellant's Opening Brief, Appellant discussed in detail the ambiguity of the prosecutor's leading questions and Detective Barling's responses to these questions. That is,

> 1. When Connor, Jelks and James testified that they feared retaliation, was their testimony "legitimate"? That is, were they testifying truthfully?
>
> or
>
> 2. Was the actual danger of retaliation to these three witnesses "legitimate"? That is, was the danger real?

Although neither the prosecutor nor the court clarified this issue each time the questions were asked and answers elicited, Respondent argues it was for the latter reason; that the danger of retaliation was real. [RB, 121-122][23]

In its response, however, Respondent fails once again to address the continuing flaw in Barling's "expert" testimony.

Appellant again acknowledges that gang experts may properly testify regarding gang retaliation in *general* terms. (*People v. Killebrew* (2002) 103 Cal.App.4th 644) However, when the gang expert is allowed to stray outside the boundaries of gangs *generally*, and is allowed to testify as to *specific* gang members' propensity to violently retaliate, the testimony is *not* admissible. It is opinion testimony of the particular gang member's propensity to violently retaliate; that is, in the "expert's opinion", the 89 Family Bloods gang member will act in conformity with that character trait.

In the instant case, Detective Barling was allowed to stray outside the boundaries of appropriate expert testimony regarding gangs *generally*,

[23] Respondent acknowledges that Detective Barling's opinion would have been inadmissible if proffered to establish the truthfulness of their testimony. [RB, 122]

and focus his testimony on the expected conduct of specific individuals; the individual members of the 89 Family Bloods gang, including Appellant.

As long as the expert's opinion testimony refers to gangs *generally*, the danger that the jury will consider it as inadmissible character evidence is minimal. When the focus of the expert's opinion testimony is on a specific gang's members, the expert opinion testimony crosses the line and becomes inadmissible character evidence. This is true even though the witness may, in fact, qualify as an expert on a particular gang, as the prosecution claims with Barling and the 89 Family Bloods gang. Hence, in the instant case, Barling's opinion testimony regarding the legitimacy of retaliation by 89 Family Bloods gang members was inadmissible character evidence and should have been excluded under Evid. Code §§ 1101(a) and 352.

Detective Barling's inadmissible opinion testimony was prejudicial to Appellant because, if nothing else, it allowed the prosecution to improperly corroborate the questionable credibility of Freddie Jelks with the testimony of a highly credible law enforcement investigator. Respondent acknowledges this was the purpose of the testimony:

> In any event, the detectives' testimony was not cumulative, but served to corroborate the existence and legitimacy of Jelks' fears. [RB, 102]

Conclusion:

The trial court erred and abused its discretion when it allowed Detective Barling to render expert opinion testimony in the areas discussed above because a) it was improper expert testimony, and/or b) it was inadmissible character evidence. Further, because it improperly corroborated the credibility of Freddie Jelks, it was prejudicial.

Accordingly, Appellant respectfully requests this Court overturn his convictions and sentence of death.

ISSUE #13

The Trial Court Erred and Abused Its Discretion When It Allowed the Prosecution to Introduce Voluminous, Unnecessary, and Highly Inflammatory Gang Evidence. This Error Was Prejudicial, and It Requires Appellant's Conviction Be Overturned.

Summary of Attorney General's Response [RB, 123-125] to Appellant's Issue #13 [AOB, 494-529]:

Although Appellant Allen identifies thirteen (13) separate aspects of gang testimony admitted at trial that were not probative of any material issue of fact at trial (i.e., not relevant) and therefore unduly prejudicial pursuant to Evid. Code 352, Respondent only addresses two. [RB, 123-125]

First, Respondent argues Detective Barling's testimony regarding the relationships between the 89 Family Bloods gang, Swans' gangs and Crips gangs was relevant because he was testifying about "the relationships between the gangs at issue in this case." [RB, 123-124]

Second, Respondent asserts Detective Barling's extensive testimony regarding gangs was admissible because it was not cumulative of Freddie Jelks' testimony. [RB, 124-125]

Appellant's Rebuttal Argument to Attorney General's Response to Issue #13:

Respondent conspicuously omits any discussion of the majority of the areas of gang testimony identified by Appellant and about which Detective Barling was allowed to testify. More specifically, Respondent omits any discussion regarding major portions of Detective Barling's testimony that amounted to no more than the introduction of his inadmissible opinions [see Evid. Code, 1101(a)] regarding the propensity of 89 Family Bloods gang members (including, of course, Appellant Allen and co-defendant Johnson) to:

- Manipulate the police to gain information because they were not afraid of the police [AOB, 506-507];

- Commit extreme acts of violence, such as murders, drive-by shootings, and walk-up shootings in an effort to increase their reputation for violence (i.e., to enhance their "respect" level or status within the gang) [AOB, 507-508; 522-523];

- Violently attack rival gang members who entered their territory [AOB, 508-513];

- Demonstrate their loyalty to the gang by committing acts of violence [AOB, 513-514];

- Violently assault their own gang members who displayed a lack of loyalty or respect for their gang [AOB, 515-516];

- Murder snitches [AOB, 516-519];

- Intimidate and retaliate against innocent individuals who cooperated with the police and/or testified against the gang's members [AOB, 516-519];

- Threaten and/or kill the innocent family members of those who cooperate with the police and/or testify against the gang's members [AOB, 519-521];

- Instill fear in the hearts of innocent victims and witnesses of violent retaliation if they say anything [AOB, 521-522];

- Commit acts of violence to enhance their reputation for violence within their gang, as well as with other rival gangs [AOB, 522-523];

Respondent also fails to address the testimony of Detective Barling in which he renders his opinion regarding Appellant's propensity to be extremely violent; opinion testimony that is clearly inadmissible character evidence. [See Evid. Code, 1101(a)] [See AOB, 523-526]

As to the claims of error actually addressed by Respondent, Respondent addresses only a small portion of Detective Barling's testimony

on the subjects. For example, Respondent argues the relationships between the 89 Family Bloods gang, Swans gangs and Crips gangs was relevant because he was testifying about "the relationships between the gangs at issue in this case." [RB, 123-124] The appellate record, however, reveals that Barling's testimony went *far beyond* "the gangs in this case", as he discussed the history of African American gangs in the Los Angeles basin [RT, 19:4294-4295], the violent rivalries between enemy gangs throughout Los Angeles [RT, 19:4294-4295], their gang tattoos, hand signs, and graffiti [RT, 19;4319-4320], etc. [See AOB, 503-506]

Conclusion:

The trial court erred and abused its discretion when it allowed the prosecution to "open the flood gates" and present to the jury a voluminous amount of irrelevant and highly inflammatory gang evidence. [AOB, 494-502] The errors were prejudicial and require reversal of Appellant's convictions and judgment of death.

ISSUE #14:

The Trial Court Error When It Allowed The Prosecution To Introduce Irrelevant And Inadmissible Opinion Evidence By Detective Tiampo That Numerous Eye Witnesses At The Scene Refused To Talk To The Police Because Of Their Fear Of Retaliation By Members Of The 89 Family Bloods Gang. The Error Was Prejudicial And Requires Appellant's Convictions and Sentence Of Death Be Reversed.

Summary of Attorney General's Response [RB, 125-126] to Appellant's Argument #14 [AOB, 528-537]:

Respondent claims Detective Tiampo's opinion testimony was relevant because it "further evidences the validity of the fears expressed by prosecution witnesses." Hence, Appellant's relevance objection was properly overruled. [RB, 125-126]

Appellant's Rebuttal Argument to Attorney General's Response to Issue #14:

Respondent's argument is a continuation of the objectionable introduction of evidence to improperly "bolster" the credibility of prosecution witnesses. The prosecution introduced inadmissible evidence, over defense objection, to improperly bolster the credibility of witness Carl Connor. (See Issue 3 in the AOB and this Reply Brief for discussion of this point.) The prosecution introduced inadmissible evidence, over defense objection, to improperly bolster the credibility of witness Freddie Jelks. (See Issue 9 in the AOB and this Reply Brief for discussion of this point.) Further, Appellant was not allowed to adequately confront and cross-examine Freddie Jelks and Marcellus James to impeach their credibility as witnesses. (See Issues 4, 6, 7, 8 and 10 in the AOB and this Reply Brief for discussion on these points.) For the trial court to then allow the prosecution to introduce Detective Tiampo's opinion testimony to *further enhance* the credibility of the key prosecution witnesses simply exacerbates the already existing error.

Whether on-lookers at the crime scene cooperated with the police or did not cooperate with the police had no "tendency in reason to prove or disprove any disputed fact that [was] of consequence to the determination of the action." (See Evid. Code, §§210, 350) The fact that the police attempted to talk to 25 or 30 people at the crime scene more than an hour after the shootings, that people were non-cooperative, and that an atmosphere of fear existed at the time (See RT, 17:3773) does not prove or disprove whether witnesses Connor, Jelks and James were truthful when they testified several years later.

If one of these 25-30 onlookers had subsequently spoken to the police and subsequently became a witness, that individual's state of mind as to why he initially declined to talk to the police would have been relevant to

support his credibility when he testified at trial. The witness would have been impeached regarding why he "waited" to come forward; hence, his initial fearful state of mind would have been relevant to explain why the witness delayed speaking to the police.

However, that was *not* the situation in this case. By his own testimony, Carl Conner had left the scene and was not present when the police attempted to talk to individuals at the crime scene. [RT, 15:3360, 3450] By his own testimony, Freddie Jelks was never at the crime scene, and he also had left the area near the crime scene when the police attempted to talk to individuals at the crime scene. [RT, 16:3576, 3578-3579] By his own testimony, Marcellus James admitted he was never at the crime scene; hence, he was not one of those on-lookers who was fearful of speaking to the police. [RT, 18:4043, 4073-4074]

Ironically, prosecution witness Donnie Ray Adams[24] was apparently present at the crime scene shortly after the shootings when the police were investigating the crime. [RT, 19:4408-4419] Adams acknowledged that he never said anything to the police until 1996 when he was in custody and trying to work out a deal with the prosecution in exchange for lenient treatment in his pending federal drug case. [RT, 19:4418-4425] At no time, however, did Adams testify that he was fearful of coming forward and speaking to the police while they were there attempting to interview on-lookers. Hence, the fact that others may have been fearful, and therefore uncooperative, was not relevant in establishing whether Adams was truthful or not truthful when he testified several years later.

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[24] Donnie Ray Adams provided no direct testimony that incriminated Appellant. Rather, he testified to out-of-court statements by co-defendant Johnson that incriminated Appellant in violation of the constitutional rule of law enunciated in *Bruton/Fletcher*. (See Issue 17 in the AOB and this Reply Brief for discussion of this point.)

Finally, in an apparent attempt to minimize the impact that Detective Tiampo's testimony may have had if it was erroneously introduced, Respondent claims it is not "a natural and reasonable inference" that "there could have been as many as 25 or 30 additional eyewitnesses to these murders" but for their fear of retaliation. [RB, 126] Appellant asserts this inference was far more natural and reasonable for a jury to make than the inference articulated for the first time in Respondent's brief. Since the trial court quickly overruled the defense objection and did not require an offer of proof by the prosecution, the court did not limit the reason as to why the jury could consider this evidence.

Conclusion

Appellant contends that Detective Tiampo's testimony was not only inadmissible to bolster the credibility of prosecution witnesses, but without any limiting instruction as to the purpose for which the jury could consider the testimony, the error was compounded. The jury undoubtedly considered his testimony as evidence that there were probably other eye witnesses to the shootings who were simply too fearful to tell the police what happened.

ISSUE #15

The Trial Court Abused Its Discretion during the Prosecution's Rebuttal Case when It Allowed the Prosecution to Introduce Photographs of "89 Family Bloods" Gang Members who Were A) Prominently Clad in Red Gang Clothing, B) Standing Amidst Extensive Gang Graffiti, C) Ominously "Throwing" Gang Hand Signs, and D) Conspicuously Clutching Deadly Firearms.

Summary of Attorney General's Response [RB, 127-131] to Appellant's Argument #15 [AOB, 537-556]:

Respondent claims that the trial court did not abuse its discretion when it ruled that the three photographs depicting 89 Family Bloods gang

members standing in gang attire, holding firearms, and appearing in front of gang graffiti were admissible.

Appellant's Rebuttal Argument to Attorney General's Response to Issue #15:

Rather remarkably, Respondent glosses over in the Respondent's Brief this very significant issue raised by Appellant, in much the same manner as the prosecutor similarly glossed over the issue in an effort to persuade the trial court to admit the photographic evidence of graphic and frightening depictions of gang activity.

The contested issue during this rebuttal testimony was *not* whether 89 Family Bloods gang members wore "black windbreakers," as Respondent suggests. [See RB, 127] The defense did *not* contest this fact, nor did the defense' expert witness (Deputy Probation Officer James Gallipeau) testify that 89 Family Bloods gang members did *not* wear "dark windbreakers." [RT 4869. 4944-4946, 4953-4956]

The contested issue was whether 89 Family Bloods gang members, including Appellant Allen, ever wore black Oakland Raiders jackets or Raiders jackets; that is, black jackets with the words "Raiders" or "Oakland Raiders" emblazoned thereon. [See AOB, Issue 15, 537-556] Defense expert witness Gallipeau testified that *only* Crips gang members wore Raiders or Oakland Raiders jackets, and that 89 Family Bloods gang members would *not* wear these jackets. [RT, 4953-4954]

The prosecutor cleverly used language in her offer of proof at trial that obscured and confused the contested issue on rebuttal, however.

> DDA: I have photographs which appear to depict individuals in Raiders-style jackets. One of them includes the defendant [Johnson] ... In addition, there are two other photographs which depict 89 Family members. One of them is wearing a black windbreaker-style jacket similar to a Raider's jacket, and the other one is a

> black jacket also similar to a Raiders' jacket. [RT, 5019. Emphasis added.]

In overruling the defense' relevance objection, the trial judge commented that Gallipeau's testimony had been "quite expansive. I believe that was his final answer .... However, some of his early answers didn't make that very clear...." [RT, 5019-5020]

To the contrary, witness Gallipeau's testimony was very clear from the very beginning to the very end, and it was very consistent regarding this issue from the very beginning to the very end. The trial court was wrong in its recollection that Gallipeau's testimony "didn't make that very clear." There was no ambiguity, nor confusion in his testimony on this subject.

Defense expert witness Gallipeau *never* testified that 89 Family Bloods gang members did *not* wear "Raiders' style jackets" or jackets that are "similar to a Raider's jacket" as the prosecutor adroitly phrased her offer of proof. Hence, there was simply no relevance in introducing photographs of 89 Family Bloods gang members wearing black windbreakers that may have appeared "similar to a Raiders' jacket" or a "Raiders style jacket", whatever that phrase meant.

However, the undue prejudice to the defense was very significant. A simple review of these three exhibits reveals the inherent prejudice. Appellant refers the court to Argument 15 in the AOB for an extended discussion regarding the unfair prejudice. [AOB, 537-556]

Respondent concludes by stating that the trial court did not abuse its discretion when it admitted the photographs, and cites the appropriate cases that so hold. [RB, 129] However, if the photographic evidence has *no* relevance, the court has *no* discretion to exercise; it cannot admit irrelevant photos. (Penal Code section 350 ["No evidence is admissible except relevant evidence."]) The cases cited by Respondent all refer to photographs that have some relevance; that is, the photos are admissible

subject to the weighing process of Evid. Code section 352. It is in the section 352 weighing process that the trial court exercises its discretion and the reviewing court gives deference to the trial court's ruling. Hence, this Court is under no obligation to give deference to the trial court's ruling.

Conclusion:

The trial court's ruling was an error of law and not an exercise of discretion to which the reviewing court gives deference. Further, as stated in Appellant Allen's Opening Brief, the error was prejudicial, particularly when considered together with other inadmissible gang evidence.

ISSUE #16:

Appellant Was Deprived Of His Due Process Right To Confront And Cross-Examine His Accusers When The Court Allowed Donnie Ray Adams To Testify Regarding An Inadequately Redacted Statement Made to Him by Co-Defendant Johnson That Incriminated Appellant.

Summary of Attorney General's Response [RB, 216-225] to Appellant's Argument #16 [AOB, 557-586]:

Respondent acknowledges that this issue was preserved for this appeal. Respondent quotes the trial court's language in which the court justified its decision that the redacted version of co-defendant Johnson's statement to Donnie Ray Adams would be admissible because "[r]easonable jurors would not 'inevitably' have drawn the inference that Allen was the unnamed co-participant to whom the statement referred.". [RB, 223]

Respondent adopts the trial court's rationale that the redacted version was proper, summarily glosses over the extended discussion in the AOB, and then simply concludes that "Appellant's claim of *Bruton/Fletcher* error is ... without merit." [RB, 225] Respondent does not address whether any error was harmless versus prejudicial.

Appellant's Rebuttal Argument to Attorney General's Response to Issue 16:

Respondent quotes the trial court's reasoning for its ruling, then summarily adopts it and likewise concludes there was no error. Respondent, however, does not address the "fatal flaw" in the trial court's reasoning.

The "fatal flaw" in the trial court's reasoning:

The trial court stated the basis for its conclusion that the redacted statement of co-defendant Johnson to Donnie Ray Adams was admissible at the joint trial:

> Crt: [Allen's counsel's] concern is that [the redacted statement] might tell the jury inferentially something about the identity of the shooter. Is it incriminatory to [Allen] in that sense? Not really....
>
> The proposed redaction simply says, whoever the shooter was, Johnson sent him out. Does that necessarily mean the jury will leap to the conclusion that that was Mr. Allen that was sent out?
>
> Add to the mix the fact that there apparently are [three] or [four] other individuals present at the scene of this get together. If one believes there was a get together at Johnson's house, it didn't involve just Mr. Johnson and Mr. Allen, but several other gang members....
>
> The jury may find from the statement it could have been anybody there that Johnson sent. And the statement doesn't say who ... he sent out. I don't know that they would have to leap to the conclusion that it had to be Mr. Allen that was sent. [RB, 219; RT, 4390-4391. Emphasis added by Appellant.]

The trial court's reasoning, Appellant respectfully asserts, is rather remarkable. Although there were several people at co-defendant Johnson's house that day, Freddie Jelks specifically testified that co-defendant

Johnson actually handed the gun to Appellant Allen! [AOB, 27-28; RT, 16:3542-3546, 3652-3653] According to Jelks, Appellant then went down the alley with the gun, shots were subsequently heard, and then Appellant returned and gave the gun back to Johnson. [AOB, 28-29; RT, 16:3546, 3555-3565, 3566-3571] Jelks said Appellant then admitted to having been the shooter. [AOB, 29-31; RT, 16:3572, 3580-3582, 3622-3623]

Further, Carl Connor testified, and his prior statements were introduced, that Appellant obtained the gun at co-defendant Johnson's house, shot both victims, then responded back to co-defendant Johnson's house with the gun. [AOB, 17-20; RT, 15:3344-3351, 3417-3422, 3843-3860]

For the trial court to state that the jurors might *not* "have to leap to the conclusion that it had to be Mr. Allen that was sent" is startling and flies in the face of the direct evidence presented at trial. The *fatal flaw* in the trial court's reasoning could not be more apparent!

Respondent's argument summarily glosses over this "fatal flaw":

Respondent adopts the trial court's rationale and writes:

> Reasonable jurors would not "inevitably" have drawn the inference that Allen was the unnamed co-participant to whom the statement referred.[Citation omitted] Given the evidence that several 89 Family members or associates in addition to Allen were present at Johnson's house prior to the shooting ... Johnson could have given the gun to someone other than Allen. [RB, 223-224]

Respondent obviously omits any reference to Jelks' and Connor's testimony at this point; testimony that was very prominent at the trial and testimony that completely undermines Respondent's argument.[25]

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[25] Respondent refers to Jelks' testimony that established other 89 Family Bloods gang members were at Johnson's house at the time [RT, 16:3520-3524, 3646], then fails to mention it was Jelks' same testimony that

The trial court's error was not harmless beyond a reasonable doubt:

Respondent refers in passing to the limiting instruction given to the jury by the trial court following the introduction of co-defendant Johnson's redacted out-of-court statement. [RB, 224-225][26], Respondent properly does *not* suggest, however, that the limiting instruction was legally sufficient to cure the error of introducing the improperly redacted statement that violated the rule of law as enunciated by this Court [See *People v. Fletcher* (1996) 13 Cal.4th 451; *Bruton v. United States* (1968) 391 U.S. 123].

However, Respondent *does* argue that the limiting instruction given by the court made it *unnecessary* for the prosecutor to distinguish in her closing argument to the jury which portions of Adams testimony they could consider against Appellant Allen and which portions they could not because "[t]he jury was clearly instructed following Adams' testimony, and reminded in the court's concluding instructions, that evidence of Johnson's statement could not be considered against Allen." [RB, 225] Not so. The prosecutor's closing argument simply exacerbated the Constitutional error committed by the trial court.

Further, Respondent argues that if there was error, it was harmless. The trial court, immediately after indicating the redacted version of co-defendant Johnson's statement would be admissible, and then indicated that the redacted version would "not necessarily cast any additional evidence on [Allen] that isn't already there in many forms." [RT, 4391] In other words,

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disclosed Johnson chose, from all those present, to give the gun to Appellant! [RT, 16:3542-3653]

[26] Respondent refers to the limiting instruction as Appellant quoted it in the AOB, 566-567, and indicates it was misquoted. [See RT, 4441] Appellant acknowledges this error and apologizes for it. However, as stated in the AOB [566-568], the limiting instructions given by the trial court were still very confusing and legally insufficient to correct *Bruton/Fletcher* error [AOB, 557-561].

admission of the redacted statement wouldn't do any harm to Appellant, even if the jury infers that co-defendant Johnson was referring to Appellant as the person to whom he gave the gun, because other witnesses had testified to these same facts.

Appellant discusses three (3) different reasons in the AOB why this error was an abuse of discretion, was prejudicial, and requires reversal. [AOB, 573-586] Respondent declines to address any of these reasons, apparently taking the position that there was simply no *Bruton/Fletcher* error when the trial court allowed the redacted version of co-defendant Johnson's statement to be introduced. However, the evidence that "contextually linked" Appellant to the third party referred to in co-defendant Johnson's redacted statement was clear and unambiguous. It was direct and it was also "powerfully incriminating." [AOB, 572-573]

<u>Conclusion</u>:

Respondent disagrees that the error in admitting Johnson's redacted statement was "powerfully incriminating on the issue of Allen's guilt, and thus violated Allen's right to confrontation." (RB, 216) As stated in considerable detail in the AOB, however, the error was very prejudicial and requires reversal of Appellant's conviction and judgment of death.

<u>ISSUE #17</u>

<u>In The Guilt Phase, The Trial Court Abused Its Discretion When It Denied Appellant's Motion To Select Two Juries Or Motion To Sever His Case From That Of Co-defendant Johnson On The Basis Of Prejudicial Association And *Bruton/Fletcher* Grounds. Appellant Was Denied His Constitutional Right To Due Process And A Fair Trial Because He Was Jointly Tried With Co-defendant Johnson.</u>

<u>Summary of Attorney General's Response [RB, 71-87] to Appellant's Argument 17</u> [AOB, 586-620]:

Whether Error Occurred When The Court Denied Appellant's Motions to Sever Made During the Guilt Phase of the Trial:

Respondent simply asserts the trial court did not abuse its discretion when it denied Appellant's Motions to Sever. In support, Respondent cites the numerous occasions when the court instructed the jury that particular statements made by co-defendant Johnson were to be considered only as to him[27], as well as an instruction that the jury could consider a statement by Appellant only as to Appellant. [RB, 77-81] Respondent impliedly suggests that these instructions sufficiently cured the problem, and that each juror was capable of understanding, remembering and abiding by each of these numerous limiting instructions.

Whether the Joint Trial Resulted in Gross Unfairness to Appellant and Deprived Appellant of Due Process and a Fair Trial:

Respondent answers that the joint trial did not result in "gross unfairness" to Appellant because there "was substantial independent evidence of Allen's guilt." [RB, 84] Respondent then cites the testimony of Freddie Jelks, Carl Connor and Marcellus James in support of this claim. [RB, 84-87] Finally, Respondent argues that co-defendant Johnson's out-of-court statements to Donnie Ray Adams that could have been used by the jury to corroborate Jelks did not occur because of the court's limiting instruction.

Appellant's Rebuttal Argument to Attorney General's Response to Issue #17:

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[27] Respondent includes the court's instruction given to the jury after Donnie Ray Adams testified as to statements made to him by co-defendant Johnson. [RB 77, and fn. 69] As Appellant points out in the AOB and this ARB under Issue #16, this Court and the United States Supreme Court have both held that a trial court's limiting instruction regarding the out-of-court statement by a co-defendant that incriminates the defendant is insufficient to cure the problem and deprives the defendant of his due process right to confront and cross-examine his accusers.

Respondent seems to suggest that a "limiting instruction" is some sort of magic talisman that has an inherent ability to cure any possible misuse of evidence by a jury. Hence, as long as the trial court gives limiting instructions, there will be no error.

In this case, Appellant respectfully contends it was literally impossible for any juror to remember what evidence he/she could consider as to *both* defendants, what evidence he/she could consider *only* as to co-defendant Johnson, and what evidence he/she could consider *only* as to Appellant

Further, and as discussed in Appellant's Opening Brief regarding whether jurors actually follow limiting instructions [AOB 594-595], the court "normally presume[s] that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an 'overwhelming probability' that the jury will be unable to follow the court's instructions." (*Greer v. Miller* (1987) 483 U.S756, 764, 97 L.Ed.2d 618, 107 S.Ct. 3102) Appellant contends this case is such a case; that there exists an "overwhelming probability" that the jury was *unable* to follow the court's instructions, not just because of the numerous instances where the court found it necessary to provide the jury with limiting instructions, but also because of the highly prejudicial and inflammatory nature of the evidence admitted solely as to co-defendant Johnson.

Further, the presumption that jurors will understand, subsequently remember and abide by *each* of the limiting instructions is "rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation." (*Richardson v. Marsh* (1987) 481 U.S. 200, 208, 95 L.Ed.2d 176, 107 S.Ct. 1702) Given the magnitude and gravity of this case, the necessity for the court to give *numerous* limiting instructions to the jury, and because of the inflammatory

nature of the content of each of co-defendant Johnson's out-of-court statements, the use of limiting instructions as a "reasonable practical accommodation" to facilitate judicial economy must give way to Appellant's substantive due process right to a fair trial.

Finally, one example illustrates why "gross unfairness" resulted that denied Appellant his right to a fair trial. Respondent cites the testimony of Freddie Jelks as "substantial independent evidence of Allen's guilt." [RB, 84] Yet, it was *because* of the joint trial that Appellant was not allowed to adequately confront and cross-examine Freddie Jelks. The trial court limited Appellant's ability to cross-examine Jelks because of its concern that it would unduly prejudice co-defendant Johnson.[28] There would have been *no* basis for the court to limit Appellant's right to confront and cross examine Jelks if severance had been granted. Respondent attempts to minimize this issue by suggesting the defense was able to adequately impeach Jelks. [RB, 84, fn. 74] However, it is not at all clear whether the jury believed, or disbelieved, Jelks. During the second day of deliberations, the jury sent out a note with two (2) different questions regarding the testimony of Jelks [RT, 26:5246-5247; AOB 620, fn. 317] Relevant portions of Jelks' testimony were read back to the jury [RT, 26:5253, 5259; AOB, 620] Subsequently, the jury requested Jelks' *entire* testimony be re-read to them. [CT, 4:842, 846; RT, 27:5491] Clearly, if Appellant had been able to further undermine the credibility of Jelks (as Appellant discusses in Issues 4, 6, 7 and 8 in his Opening Brief and this Reply Brief), a more favorable result would have been obtained.

Conclusion:

The trial court erred and abused its discretion when it denied Appellant's Motion for Two Juries and Motions to Sever his case from that

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[28] See Appellant's full discussion of this matter at AOB Issue #4 [174-228] as well as ARB Issue #4 **[Add p #].**

of co-defendant Johnson on the bases of prejudicial association and *Bruton/Fletcher*. [AOB, 586-598]

Further, even if the trial court did not abuse its discretion and err when it denied Appellant's motion to sever, Appellant was deprived of his right to due process and a fair trial because of evidence introduced at the joint trial that was presented solely against co-defendant Johnson. Appellant identified and discussed eight (8) examples of highly prejudicial evidence that would *never* have been admitted if Appellant had been tried separately, but that significantly influenced the jury in its consideration of Appellant's guilt or lack thereof. [AOB, 598-619]

For all of these reasons, Appellant respectfully urges this Court overturn his convictions and judgment of death.

ISSUE #18

The Trial Court Deprived Appellant Of His Constitutional Right To A Jury Of His Peers When It Removed A Juror During Deliberations Without Good Cause On The Basis The Juror Refused To Deliberate. The Court's Inquiry Demonstrated The Juror Was Willing To Deliberate, But Would Not Agree With The Conclusions Of A Majority Of Jurors.

Summary of Attorney General's Response [RB, 238-268] to Appellant's Argument #18 [AOB, 620-650]:

Respondent argues that the trial court did not abuse its discretion when it removed Juror #11 because it found there was a "demonstrable reality" that Juror #11 was unable to perform his duties in this case [RB, 256, 268]; that Juror #11 had prejudged the case and had considered evidence outside the record. [RB, 259, 262]; and that the court did not excuse Juror #11 because he was unwilling to deliberate. [RB, 262]

Respondent further asserts that any *improper manner* in which the court inquired into the alleged juror misconduct was waived because the defense did not object [RB, 259], and that any "chilling effect" that resulted from the court's questioning was also waived because of a lack of defense objection [RB, 260]. But even if the court's alleged improper manner of inquiry was not waived for appeal, Respondent adds that the court's questions were "neutral" in nature, they were not overly broad in scope, and they did not intrude into the jury's deliberative process. [RB, 259, 261] Finally, Respondent maintains that the court's questioning of jurors had no chilling effect on jurors and, further, that the court did not indicate a preference as to what verdict the jury should return. [RB, 260]

Appellant's Rebuttal Argument to Attorney General's Response to Issue #18:

Appellant asserts the dismissal of Juror #11 was prejudicial error because

a) the court's extended inquiry of each juror was improper since, after questioning the two complaining jurors and two other jurors, the court stated, "I'm not convinced at this point in the inquiry that there is any gigantic problem at all. People have made comments as jurors will do. I have not yet heard anybody ... convince me there's been misconduct at this point." [RT, 26:5379][29];

b) the court's inquiry improperly focused on the content of juror deliberations and not on the conduct of jurors [AOB, 639-641];

c) the court's inquiry was unnecessarily aggressive and intrusive, thereby creating a "chilling effect" on further jury

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[29] Respondent delicately attempts to circumvent these express words by fictionalizing the courts' state of mind, and announcing that the court's express words were "merely tentative." (RB 258) The record offers no support for this hypothesis.

deliberations, particularly on those jurors in the minority in the deliberation process [AOB, 637-639]; and

d) the record does not support the trial courts' finding of misconduct under the required *Cleveland* standard of a "demonstrable reality." [AOB, 641-647].

Respondent, simply put, disagrees with Appellant Allen regarding whether the trial court abused its discretion when it removed Juror #11. The record on appeal is clear as to this issue. In his Opening Brief Appellant Allen discussed in considerable detail the facts found in the appellate record regarding this issue and applied them to the law. Further reiteration in this Reply Brief is not necessary.

Appellant does point out, however that Respondent conspicuously fails to address Appellant's claims regarding the nature and scope of the court's questions; that is, the leading, suggestive, compound, often confusing, and repeated rephrasing of the *same* questions to jurors. (AOB 632-636).

Further, Respondent's suggestion that the court's nature and scope of inquiry did not have a "chilling effect" on the jurors is belied by the responses of several jurors to the court's questioning.

A review of the record demonstrates how damaging the trial court's inquiry was to Appellant's right to a fair and impartial jury. Once begun, the inquiry seemed to propel itself. As the court moved from one juror to the next, the court's manner became more abrasive. For example, Juror #7, a woman, initially thought the court was targeting her: "No. I didn't [prejudge]. But some did." (RT, 26:5395-5397) Juror # 7 then endured a barrage of questions clearly aimed at uncovering who the jurors were to whom Juror #7 referred when she claimed that "some did" prejudge the case, as well as what each one specifically said during deliberations:

CRT: Which juror or jurors? ... Do it by seat number. It

> would be simpler. ... Do you remember who? ... What is the person's name? ... Is it more than one person or one person? ... How many? ... About 5 people? ... You can't tell me which ones? Can you tell me where they are sitting or anything like that? ... Where? ... No.9. Who else? Anybody else that you can think of? What led you to believe that -- Well, lets find out who else. Anybody else? ... What sorts of things were said that made you believe that these folks had already decided the matter? ... What did they say that led you to believe that they had made up their minds already? ... My question is what did the people say to cause you to conclude that they already had their mind made up before you guys even deliberated? [RT, 26:5395-5397]

Juror #7 finally claimed to have heard somebody say "I had my mind made up before I already came in here." [RT, 26:5398] The trial court's reaction was comparable to a hunter with a deer in the crosshairs: "That is the person that I am interested in. Who was that person? Name? Seat? Description? However you want to do it." [RT, 26:5398] When Juror #7 struggled to remember, the court demanded, "Do it anyway." [RT, 26:5398-5399] When Juror #7 hedged and wasn't sure, the court stated, "We will have to have you sit there until you recall for me." [RT, 26:5399]

The court maintained this pressure with Juror #8, stating, "You will have to sit and think for a while and tell me by name or seat or description or some other way. So take your time." [RT, 26:5403-5404] And as with Juror #7, the court bombarded the juror with a series of accusatory questions: "Men or women or a mixture?; ... What did they look like? Black? White? Old? Young?" [RT, 26:5404] The courts' pressure lead Juror #8 to state, "Let me make sure I get this right [trying to recall exactly what Juror #12 said]. I don't want to make a mistake and implicate anybody." [RT, 26:5407]

This aggressive and intrusive manner of questioning was employed by the court throughout the inquiry. The effect on the individual jurors was readily apparent. Juror #1 asked if he was under oath prior to answering the court's *fifth rephrasing* of "who is failing to deliberate?" [RT, 26:5366] Jurors #7 and #8 floundered as they tried to recall specifics while being verbally badgered and scolded like children. [RT, 26:5398-5399, 5403-5407]

The court's intimidating questions far exceeded the boundaries of caution. Clearly, the "sanctity of deliberations" cannot exist where jurors respond to the court's questions by asking, "Am I under oath?" or by worrying about "implicating" another juror before answering a question by the court. The highly intrusive interrogation-style tactic employed by the court created fear in the jurors and "deprive[d] the jury room of its inherent quality of free expression." (*People v. Johnson* (1992) 3 Cal.4th 1183, 1255.)

Conclusion:

During jury deliberations, the trial court abused its discretion and prejudicially erred when it dismissed Juror #11 *who had doubts about the credibility of the prosecution's case.* [AOB, 620-624] The court's inquiry focused on the *content* of the jury deliberations, *not* the *conduct* of the particular juror. [AOB, 624-625] Further, the aggressive, invasive manner of the court's questions, as well as the unnecessary scope of the questioning, improperly intruded on the sanctity of the jury's deliberations. [AOB, 626]

This error deprived Appellant of his right to a unanimous jury verdict by his peers and requires his convictions and judgment of death be reversed. [AOB, 627-650]

ISSUE #19

The Trial Court Deprived Appellant Of His Constitutional Right To A Jury Of His Peers When It Failed To Remove Two Jurors Who Intentionally Violated The Court's Instructions And Were Unwilling To Deliberate With Other Jurors.

Summary of Attorney General's Response [RB, 269-278] to Appellant's Argument #19 [AOB, 650-656]:

Respondent acknowledges that Juror #4 and Juror #5 "committed, at most, a technical violation" of the court's instruction to "not discuss any subject connected with the trial unless all 12 of [the jurors] were together." [RB, 276] Although this amounts to a presumption of prejudice, Respondent asserts it was rebutted by the nature of the misconduct, the surrounding circumstances, and the court's finding that the jurors had acted in good faith. [RB, 276-278]

Appellant's Rebuttal Argument to Attorney General's Response to Issue #19:

The uncontradicted facts illustrate that at the conclusion of the fourth day of deliberations, Jurors #4 and 5 had not been able to persuade Juror #11 of their position. After all jurors had been excused for the day, Jurors #4 and 5 met covertly to discuss their dilemma regarding Juror #11. [RT, 26:5283-5286] Their desire to meet and discuss Juror #11 privately, and without other jurors present, was manifest when they *lied* to Juror #8 about why they were still in the jury room talking. [TR, 26:5318-5319] When the bailiff discovered them alone in the jury room, they advised the bailiff that they wanted to talk to the judge "now", and that they did not want the lawyers to be present. [RT, 26:5284-5285] The bailiff finally had to demand they leave the courtroom. [RT, 26:5286]

The following day, the court questioned Jurors #4 and 5 in the presence of the lawyers. The version given by the two jurors was

somewhat consistent with each other, but their version regarding Juror #11's involvement in the deliberations was *contrary* to the observations of the other jurors regarding whether Juror #11 was participating in the deliberation process. [See AOB, Argument #18, [620-650] for an extended discussion of the responses of each of the jurors to the court's questions.]

Appellant submits there is insufficient evidence in the record that rebuts the presumption of prejudice that arose when these two jurors committed misconduct by intentionally meeting privately and outside the presence of other jurors to formulate a complaint regarding misconduct by Juror #11, a complaint not substantiated by any other juror. Their conduct resulted not only in the improper removal of a deliberating juror (See Argument 18, *supra*), but it also had a chilling effect on the remaining jurors during the subsequent guilt and penalty phase deliberations.[30]

Appellant submits that, for the reasons stated above and in Appellant's Opening Brief, the trial court abused its discretion and erred when it declined to remove Jurors #4 and 5 from further deliberations. This error necessitates that Appellant's convictions and judgment of death be reversed.

ISSUE #20

THE TRIAL COURT GAVE THE DEADLOCKED JURY A SUPPLEMENTAL INSTRUCTION THAT PLACED "UNDUE PRESSURE" ON THE JURY TO REACH A VERDICT AND VIOLATED APPELLANT'S DUE PROCESS RIGHT, AS WELL AS HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

[30] Other jurors would have concluded that if they did not agree with the conclusions reached by the foreman (Juror #5) and Juror #4, they, too, would become the subject of a complaint to the judge about juror misconduct.

Summary of Attorney General's Response [RB, 279-291] to Appellant's Argument #20 [AOB, 656-673]:

Respondent argues that the defense at trial did not object to the court's instruction to the jury. Accordingly, this claim was waived. (RB, 284) Respondent further argues that the court's instruction to the jury was not coercive; hence, there was no error. [RB, 285-290]

Appellant's Rebuttal Argument to the Attorney General's Response to Issue #20:

This Issue Was Preserved for Appeal.

The lack of a defense objection to the court's supplemental jury instruction should not be deemed a waiver to Appellant's right to raise this issue. In *People v. Gainer* (1977) 19 Cal.3d 835, this Court stated,

> Clearly defendants cannot be required to anticipate supplemental instructions a judge might give, upon pain of inviting error. Nor was defense counsel required to interrupt the judge's charge at every controversial phrase, thereby courting the animosity of the jury and implying that the charge hurt his client's case. Indeed common courtesy, and respect for the dignity of judicial proceedings, caution against interruption of a judge who is advising the jury." (*People v. Gainer, supra*, 19 Cal.3d at 843.)

The trial court's instructions and comments exerted "undue pressure upon the jury to reach a unanimous verdict."

Respondent argues that because the court read a series of jury instructions to the jury several days before [RB, 285], that resolves this issue. That argument assumes that each of these instructions were not only understood by the jurors, but were also uppermost in each juror's mind at the moment the court gave them the additional instructions.[31] Respondent completely ignores and dismisses any significance of the events that

[31] The initial instructions were given to the jury almost one week prior to the complained of supplemental instruction.

occurred during the previous four (4) days of deliberations, in which individual jurors were interrogated by the court and finally, Juror #11 was dismissed. Such an assumption, Appellant Allen respectfully submits, flies in the face of reality and common sense.[32]

In effect, Respondent simply disagrees with Appellant regarding whether the supplemental instruction and comments by the trial court "exerted undue pressure on the jury to reach a verdict." Appellant submits that the trial court's comments and supplemental instruction to the reconstituted jury undermined the previous instructions given to the jury. When the court's comments and supplemental instruction to the jury is viewed in the context of the entire deliberation process (See Appellant's discussions in Issues #18 and #19), the coercive effect of the instruction becomes that much more apparent, particularly to the minority jurors. Appellant respectfully refers the Court to his extended discussion of this issue in Appellant Allen's Opening Brief.

The trial court erred when it gave the deadlocked jury a supplemental instruction that placed "undue pressure" on the two (2) minority members of the jury to reach a verdict. The court's conduct was prejudicial and violated Appellant's due process right to a fair trial by an impartial jury.

ISSUE #21

[32] Such an argument is akin to the boilerplate small print language contained at the conclusion of lengthy consumer contracts, in which the enforcer of the contract argues the non-lawyer consumer should be bound by the language of the contract. That assumes, of course, that the non-lawyer consumer read, understood, and remembered each of those details! Such an assumption, Appellant submits, is totally inconsistent with reality.

In The Penalty Phase, The Trial Judge's Denial Of Appellant's Motion For A Separate Penalty Phase Trial Was Prejudicial Error, Requiring Reversal Of Appellant's Convictions And Judgment Of Death.

Summary of Attorney General's Response [RB, 306-317] to Appellant's Argument 21 [AOB, 673-691]:

Respondent claims no error resulted from the denial of Appellant's motion to sever the penalty phase portion of the trial from that of co-defendant Johnson because the court and counsel could "focus the jury" as to each defendant. [RB, 306] Further, any problem was "cured by appropriate instructions and admonitions to the jury." [RB, 308, 311]

Appellant's Rebuttal Argument to Attorney General's Response to Issue #21:

In determining whether a trial court abused its discretion when it declined to sever defendants, this Court has written that "[i]n the absence of a showing that the jurors . . . were unable or unwilling to assess independently the respective culpability of each co-defendant", no abuse of discretion will be found. (*People v. Taylor* (2001) 26 Cal.4th 1155, 1174) Additionally, "[w]hen the trial court's denial of severance . . . is urged as error on appeal . . ., the error is not a basis for reversal . . . in the absence of identifiable prejudice or 'gross unfairness . . . such as to deprive the defendant of a fair trial or due process of law.'" (*People v. Cummings* (1993) 4 Cal.4th 1233, 1287)

In Appellant's Opening Brief, Appellant identified "a showing that [one of the jurors . . . was] unable or unwilling to assess independently the respective culpability of each codefendant." Appellant identified an example of "identifiable prejudice" that amounts to "gross unfairness . . . such as to deprive [Appellant] of a fair trial or due process of law." [AOB, 687-688] Respondent chose to omit any reference to this rather dramatic incident raised by Appellant.

During the penalty phase, and amidst the extensive violent, inflammatory evidence being introduced *solely* against co-defendant Johnson, alternate juror #2 sent a handwritten note to the judge. Therein, the juror expressed fear for her safety because Appellant and his attorney, Mr. Orr, were "looking" at her. [CT 5:975, 977; RT, 32:6553] This juror was not only *unable* to abide by the court's limiting instruction (i.e., the jury had been instructed to not consider the evidence being presented at that time against Appellant), but she had become so emotionally fearful because of the evidence being presented against co-defendant Johnson that she expressed fear for her safety because one of the *defense attorneys* was *looking* at her.

Other jurors were aware of alternate juror #2's fears. They were aware of the contents of the note she had passed to the judge. [RT, 32:6571-6572] It is unreasonable to assume she was the only juror with these concerns.

The point Appellant seeks to make seems clear: The juror was instructed to consider the evidence being presented *solely* as to co-defendant Johnson. She was *unable* to follow that instruction, however, even to the point of actually verbalizing her fear in writing -- not that co-defendant Johnson was looking at her, but that Appellant Allen and his *trial counsel* were looking at her!

Conclusion:

The only announced rationale for joint trials in California is judicial economy. (*People v. Keenan* (1988) 46 Cal.3d 478, 501) While joint trials may save time and expense, "the pursuit of judicial economy and efficiency may never be used to deny a defendant his right to a fair trial." (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 451-452) In Appellant's Opening Brief, Appellant discussed judicial economy as the basis for joint trials, then compared and contrasted evidence admitted in the penalty phase at this

trial that was damaging to Appellant but would *not* have been admitted if Appellant's penalty phase of the trial had been conducted separately from that of co-defendant Johnson.

Because of the highly damaging and inflammatory nature of the evidence introduced against the co-defendant, plus the prosecution's continued exhortation that the co-defendant was the gang's "shotcaller", and that others, including Appellant, would do his bidding, the brief instruction by the trial court to consider the evidenced separately as to each defendant was insufficient to overcome the prejudice resulting from the joinder the penalty phase trials. [AOB, 692-705]

For all the above reasons, Appellant respectfully urges this Court overturn his sentence of death.

ISSUE #22

Appellant Was Denied His Constitutional Due Process Right To A Fair Trial In The Penalty Phase When The Prosecution Was Allowed To Introduce A Voluminous Amount Of Extremely Prejudicial, Frightening, And Highly Inflammatory Gang Evidence During The Penalty Phase In Violation Of Evid. Code, §352

Summary of Attorney General's Response [RB, 337-341] to Appellant's Argument #22 [AOB, 692-705]:

Respondent claims the court did not err when it allowed Roderick Lacy to testify to a conversation he overheard while he was in jail that was introduced to circumstantially explain why his testimony was inconsistent with his comments to law enforcement earlier that day. Further, even if error, it was not unduly prejudicial. [RB, 337-339][33]

[33] In footnote 191 of Respondent's Opening Brief, Respondent candidly admits Detective Tizano's testimony was erroneously admitted because it was speculative on his part. Respondent attempts to cure the error by noting Appellant did not object to Tizano's testimony; hence any error was

Respondent also claims that any error involving improper questions posed to Earl Woods was waived because of the defense's failure to object. [RB, 341] Further, the questions posed by the prosecutor were proper because elicited relevant evidence regarding Wood's state of mind. [RB, 341]

<u>Appellant's Rebuttal Argument to Attorney General's Response to Issue #22</u>:

<u>Roderick Lacy's testimony</u>:

Appellant does not disagree with Respondent that Roderick Lacy's credibility was placed in issue when he declined to testify consistently with that which he told law enforcement earlier that same day. Hence, Lacy's testimony that he overheard inmates talking in the jail regarding him would have been relevant to establish he was fearful while testifying. If that had been the extent of the prosecution's inquiries of Lacy, Appellant would not have raised this claim of error on appeal.

The prosecution went *far beyond* this basis for Lacy's state of mind, however, and Respondent omits any discussion of this additional highly inflammatory and unduly prejudicial gang evidence. Appellant respectfully refers the Court to his arguments in his Opening Brief wherein Appellant discusses in detail the attempts by the prosecutor to get Lacy to further testify to the violent character traits of Crips and Bloods gang members for fighting with each other, thereby creating by innuendo the suggestion that Appellant had a motive for the killing of Chester White. [AOB, 695]

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waived. [RB, 339-340] However, as Appellant noted in his Opening Brief [AOB, 696-697], because the court refused the defense' request for an offer of proof in this area fraught with potential prejudice and for which no discovery had previously been provided to the defense, Detective Tizano's highly prejudicial and speculative testimony was disclosed to the jury. Any defense objection at this point, or request for a limiting instruction, would only have highlighted the jail house threat; hence, the error was not waived.

Further, the prosecutor began suggesting answers to Lacy regarding his fears; that he had to "watch his back" while in jail; that "bad stuff" could happen to someone who testified against a gang member; and that he could get beat up, stabbed, and "everything in the book." [AOB, 695]

Earl Wood's testimony:

Appellant did object, numerous times, to identical questions posed by the prosecutor to Carl Connor, Freddie Jelks, and Marcellus James during the guilt phase of the trial. On practically every occasion, the court overruled the defense objections. [See AOB, 384-411]

Respondent intimates that defense counsel should have continued to object to the on-going carelessly phrased questions by the prosecutor, in order to preserve this issue for appeal. This is an untenable position. In essence, Respondent suggests defense counsel must risk alienating the jury with constant objections that might create the impression that defense counsel is simply badgering prosecution witnesses.

Defense counsel's failure to repeatedly object does not waive this error on appeal. (See, *Green v. Southern Pacific Co.* (1898) 122 Cal. 563, 565, 55 P. 577 [Once a party has formally made an objection, he is not required to renew the objection at each re-occurrence thereafter]; *People v. Woods* (1991) 226 Cal.App.3d 1037, 1051 [same]; *People v. Calio* (1986) 42 Cal.3d 639, 643 [" 'an attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions, does not waive the error in the ruling by proceeding in accordance therewith and endeavoring to make the best of a bad situation for which he was not responsible.' [Citation.]"]; *People v. Carpenter* (1999) 21 Cal. 4th 1016 [Propriety of impeaching a capital murder defendant with two prior theft convictions was preserved for appeal by defendant's pretrial objection and by the holding of a pretrial hearing, even though defendant did not renew his objection at trial].

Further, this Court has often stated the principle that where "the question whether defendant has preserved his right to raise this issue on appeal is close and difficult, we assume he has preserved his right, and proceed to the merits. We have done the same in similar situations in the past." (*People v. Bruner* (1995) 9 Cal.4th 1178, 1183, fn. 5.)

Moreover, in death penalty cases this Court's primary concern has been to avoid a miscarriage of justice, rather than "objection perfection." See generally *People v. Bob* (1946) 29 Cal.2d 321; *People v. Easley* (1983) 34 Cal.3d 858; *People v. Frank* (1985) 38 Cal.3d 711. See also Appellant's Reply Brief, Issue #6 discussion.

Finally, Respondent summarily argues Appellant's claim of error "lacks merit"; that "the prosecutor's questions obviously went to Woods's [sic] state of mind." [RB, 341] This rather cavalier conclusion effectively excuses any further need by Respondent to respond to this claim of error.

However, Appellant vigorously asserts it is not at all clear that the jury considered Woods' testimony for that purpose and that purpose alone! Evidence that is relevant for state of mind purposes may still be inadmissible if the undue prejudice substantially outweighs the probative value. [Evid. Code, 352] Here, the danger that the jury would consider Wood's testimony as inadmissible character evidence of the propensity of Appellant and his fellow gang members to "kill snitches" is patently obvious. [See Evid. Code, 1101(a)] As Appellant discussed in detail in his Opening Brief, much of what Woods was asked about did *not* pertain to his state of mind. [AOB, 698-699; RT, 32:6438-6439]

Conclusion:

The testimony of Lacy and Woods encompassed much more than simply establishing inferentially their subjective state of mind of fear. They also were allowed to testify, and the jury undoubtedly considered, that 89 Family Bloods gang members possessed a propensity for violence. When

the prosecution introduced gang evidence to prove Appellant and his fellow gang members had a propensity to commit acts of savagery and to retaliate violently, California law is clear and unambiguous: Gang evidence is not admissible for that purpose. [Evid. Code, 1101(a)]

The jury was exposed to a voluminous and malevolent amount of gang evidence during the guilt phase of this trial. The improperly admitted penalty phase testimony of Lacy and Woods greatly exacerbated the already substantial danger that the jury would be unduly influenced by the violent character traits possessed by Appellant and his fellow gang members. Appellant asserts that no reasonable juror could have put aside his or her emotional feelings of abhorrence and revulsion that was directed towards the members of the 89 Family Bloods gang. Further, no limiting instruction could possibly have removed this taint.

Accordingly, Appellant respectfully requests this Court overturn his sentence of death.

ISSUE #23

The Cumulative Effect Of The Errors In This Case, Require That Appellant's Conviction And Death Sentence Be Reversed

Summary of Attorney General's Response [RB, 358] to Appellant's Argument 23 [AOB, 706-711]:

Respondent refers to his previous arguments specific to each issue raised.

Appellant's Rebuttal Argument to Attorney General's Response to Issue #23:

Appellant submits this argument as articulated in Appellant's Opening Brief. [AOB, 706-711]

ISSUE #24

California's Death Penalty Statute, As Interpreted By This Court And Applied At Appellant's Trial, Violated The Due Process Clause Of The 14th Amendment To The United States Constitution

Summary of Attorney General's Response [RB, 71-87] to Appellant's Argument 24 [AOB, 711-764]:

Respondent cites each constitutional issue raised by Appellant in his Opening Brief and cites prior California Supreme Court decisions that have considered, and rejected, these claims.

Appellant's Rebuttal Argument to Attorney General's Response to Issue #24:

Appellant submits this argument as articulated in Appellant's Opening Brief. [AOB, 711-764]

Conclusion

Appellant argues that California's death penalty statute, as interpreted by this Court and applied at Appellant's trial, violates the Due Process Clause of the 14th Amendment to the United States Constitution, and he seeks in this argument to preserve these issues for further appeal, if necessary. Specifically,

1. PC §190.2 is impermissibly broad. [AOB, 712-716]
2. PC §190.3(a) allows the arbitrary and capricious imposition of the death penalty. [AOB, 716-721]
3. California's death penalty statute contains no safeguards to avoid arbitrary and capricious sentencing and deprived Appellant of the right to a jury trial on each factual determination prerequisite to a sentence of death. [AOB, 721-754]
4. California's sentencing scheme violates the Equal Protection Clause of the U.S. Constitution by denying procedural safeguards to capital defendants that are afforded to non-capital defendants. [AOB, 754-761]

5. California's use of the death penalty as a regular form of punishment falls short of international norms of humanity and decency and violates the 8th and 14th Amendments of the U.S. Constitution. [AOB, 761-764]

For each of the above reasons, Appellant respectfully urges this Court overturn his convictions and judgment of death.

CONCLUSION

JOINDER IN ARGUMENTS OF APPELLANT JOHNSON

Pursuant to Rule 13 of the California Rules of Court, Appellant hereby joins in those arguments that will be raised on behalf of co-appellant Johnson in his Reply Brief, to the extent they may inure to his benefit. See Cal. Rules of Court, Rule 13(a)(5).

For all of the foregoing reasons, Appellant respectfully requests this Court reverse his convictions and sentence of death, and pursuant to his Argument 2, *supra*, reverse his case *with prejudice*.

DATED: 12/21/06 Respectfully submitted,

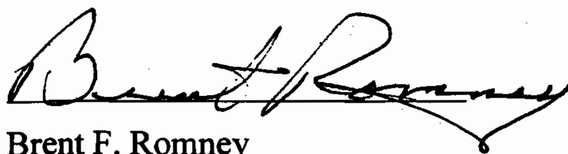
Brent F. Romney
Attorney for Appellant
Michael Allen

CERTIFICATE OF COUNSEL

[CAL. RULES OF COURT, RULE 36(B)(2)]

I, Brent F. Romney, am appointed by this Court to represent Appellant, Michael Allen, in this automatic appeal. I conducted a word count of this Reply Brief using my office's computer software. On the basis of that computer-generated word count, I certify that this brief is 25,079 words in length excluding tables, attachments and certificates.

Dated December 22, 2006.



Brent F. Romney

DECLARATION OF SERVICE BY MAIL

Re: People v. Allen and Johnson

No. BA105846-01
(Cal. Supreme Ct. No. S066939)

I, Brent F. Romney, declare that I am over 18 years of age, and not a party to the within cause; by business address is 101 South Kraemer Blvd., Suite 240, Placentia, CA 92870. A true copy of the attached

APPELLANT'S REPLY BRIEF ON APPEAL

was provided to each of the following, by placing same in an envelope addressed, respectively, as follows:

Mr. Michael Allen (Appellant)
P.O. Box J-03047
San Quentin State Prison
San Quentin, CA 94974

Mr. Gary Lieberman, Esq.
Office of the Attorney General
300 South Spring Street
Los Angeles, CA 90013

Luke Hiken, Esq.
California Appellate Project
101 2nd Street, Suite 600
San Francisco, CA 94105

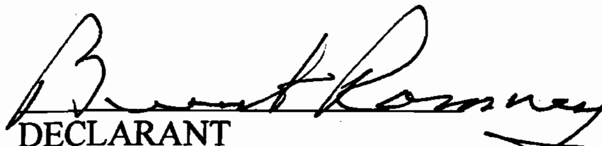
Andrew S. Love, Esq.
Office of State Public Defender
221 Main Street, 10th Floor
San Francisco, CA 94105

Ms. Addie Lovelace
Death Penalty Appeals
L.A. County Clerk's Office
210 West Temple Street
Los Angeles, CA 90012

Each respective envelope was then, on 12-22-06, sealed and deposited in the United States mail in Orange County, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 12/22/06 at Placentia, California.



DECLARANT